Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

FRANCIS BATTAGLIA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Sixth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, requires that the plaintiff prove proximate causation as an element of a claim for damages.

2. Whether the imposition of liability under FELA based upon exposure to *any* diesel exhaust conflicts with this Court's decisions requiring courts to defer to a federal agency's interpretation of its own safety regulation.

LIST OF PARTIES AND AFFILIATES

The parties to this matter are listed in the caption to the petition.

RULE 29.6 STATEMENT

Petitioner Consolidated Rail Corporation ("Conrail") is jointly owned by CSX Corporation and Norfolk Southern Corporation, both of which are publicly traded and, indirectly, hold more than 10% of Conrail's stock. No other publicly held company owns more than 10% of Conrail's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Conrail respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Ohio.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinions of the Court of Common Pleas of Lucas County, Ohio granting Respondent's motions for partial summary judgment are reproduced in the appendix to the petition ("Pet. App.") at 28a-33a, and 34a-38a. The opinion of the Court of Appeals of Ohio, Sixth Appellate District, affirming the judgment of the trial court is unreported, and is reproduced at Pet. App. 2a-27a. The order of the Supreme Court of Ohio declining to review the decision of the Court of Appeals is reproduced at Pet. App. 1a. The order of the Supreme Court of Ohio denying Conrail's timely motion for reconsideration is reproduced at Pet. App. 39a.

JURISDICTION

The final judgment of the Court of Appeals was entered on October 16, 2009. The Supreme Court of Ohio, with three justices dissenting, declined to review the decision of the Court of Appeals on February 10, 2010. On April 14, 2010, the Ohio Supreme Court denied Conrail's timely motion for reconsideration of its order declining to review the judgment of the Court of Appeals. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, are reproduced at Pet. App. 40a. Relevant portions of the

Locomotive Inspection Act ("LIA"), 49 U.S.C. § 20701, are reproduced at Pet. App. 41a. The Railroad Locomotive Safety Standard appearing at 49 C.F.R. § 229.43(a) is reproduced at Pet. App. 42a.

STATEMENT OF THE CASE

In this case, Respondent Francis Battaglia obtained $2,600,000 in damages under the Locomotive Inspection Act, 49 U.S.C. § 20701 ("LIA"), and the Federal Employers' Liability Act, 45 U.S.C. § 51 ("FELA") based upon his claim that he suffered from asthma caused by exposure to diesel exhaust while employed by Conrail. Pet. App. 2a ¶ 1; *id.* at 3a ¶¶ 4-5. The trial court granted summary judgment for Battaglia as to causation, and the court of appeals affirmed, because both courts concluded that FELA requires only that the exposure to diesel exhaust "contributed to any degree, even the slightest, to Plaintiff's asthma." *Id.* at 32a; see *id.* at 7a ¶ 26, 11a ¶ 40. The trial court also granted summary judgment to Respondent, and the court of appeals affirmed, based upon the conclusion that exposure to diesel exhaust at *any* level violates 49 C.F.R. § 229.43, a safety regulation under the LIA promulgated by the Federal Railroad Administration (FRA). The violation of that safety regulation, in turn, was deemed to constitute negligence *per se* under FELA. This case presents two issues of recurring national importance.

First, the case presents the issue whether a plaintiff must prove that an alleged violation of FELA was a proximate cause of his injuries, or whether, as the trial court and the court of appeals ruled, plaintiff must show only that a violation "contributed to any degree, even the slightest" to plaintiff's alleged injuries. Courts across the country have reached

conflicting decisions regarding what is required to establish causation under FELA, and that conflict has grown more pronounced in the wake of this Court's ruling and separate opinions by concurring Justices in *Norfolk Southern Railway* v. *Sorrell*, 549 U.S. 158, 160 (2007).

In *Sorrell*, the full Court declined to reach the issue whether proximate causation was an element under FELA, but, in a concurring opinion, Justice Souter, joined by Justices Scalia and Alito, argued that proximate causation is an element under FELA. Justice Souter explained that the "even the slightest" language from *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500, 506 (1957), did not provide an alternative causation standard. 549 U.S. at 172-77 (Souter, J., concurring). Justice Ginsburg, in contrast, expressed her view that *Rogers* adopted a "relaxed" causation standard for FELA claims. *Id.* at 178 (Ginsburg, J., concurring in judgment). These competing views about the requirements of FELA mirror a deep divide among federal and state courts throughout the nation. *Id.* at 173 n.* (Souter, J., concurring) (identifying conflicting authorities).

As a result of this conflict, plaintiffs and defendants across the country are subject to different standards for proving a core element under FELA depending on geography and, in some states, depending upon which court (federal or state) the case is filed. This deep and persistent conflict undermines FELA's goal of "creat[ing] uniformity throughout the Union" in cases involving injuries to railroad employees. *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980). Here, in seeking summary judgment, respondent highlighted that he was not required to prove "proximate cause," and the trial court's grant of summary judgment was predicated upon its

assessment whether the record satisfied the "relaxed" "even slightest degree" standard first set forth in *Rogers*. As a result, this case squarely presents the issue whether proximate causation is an element under FELA.

Second, this case presents the question whether the courts below violated this Court's precedent when they refused to consider the views of the Federal Railroad Administration (FRA) – the agency that promulgated and enforces the LIA safety regulation at issue in this case – when assessing whether the safety regulation's requirements had been violated. The FRA has concluded, in a report to Congress, that it looks to the exposure thresholds adopted by OSHA "to determine compliance with the Locomotive Inspection Act." Pet. App. 46a. That interpretation is entirely consistent with the language of § 229.43(a), and therefore is subject to deference under this Court's controlling decisions.

The court below, however, disregarded the FRA's interpretation and concluded that a railroad violates 49 C.F.R. § 229.43 whenever diesel exhaust makes its way into a locomotive cab. Pet. App. 10a-11a ¶ 38. The refusal of the court of appeals to consider the FRA's interpretation of its own safety regulation is contrary to this Court's holdings that require "substantial deference to an agency's interpretation of its own regulations" so that "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted); see also *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *accord* 2 Kenneth C. Davis, *Administrative Law Treatise* § 7:22, at 105 (2d ed. 1979). That deference is all the more appropriate

where, as here, the regulation concerns "a complex and highly technical regulatory program." *Thomas Jefferson Univ.*, 512 U.S. at 512.

The erroneous ruling of the court below is one of surpassing importance because the standard adopted imposes an onerous and unwarranted burden on railroads by subjecting them to liability without any finding that the levels of diesel exhaust exceed permissible thresholds identified by OSHA. Because the decision below is irreconcilable with the standards established by this Court, certiorari should be granted.

A. Statutory Background

For more than a century, FELA has provided a remedy under federal law for railroad workers whose workplace injury or death was caused by the actions of a railroad. 45 U.S.C. § 51. The interpretation of FELA is guided by a clear and simple rule: "Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law." *Sorrell*, 549 U.S. at 165-66; *accord Consol. Rail* v. *Gottshall*, 512 U.S. 532, 544 (1994); *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949). Thus, the elements of a common-law negligence claim apply to actions under FELA unless FELA's text explicitly rejects or obviously conflicts with the traditional common-law standard. *Sorrell*, 549 U.S. at 165-66.[1]

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[1] For example, FELA expressly departed from the common law by abolishing the contributory negligence defense and instead adopting a comparative negligence regime, which was an innovation when FELA was enacted in 1908. 45 U.S.C. § 53 ("the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."). FELA

FELA differs from a traditional workers compensation statute, however, as it does not adopt no-fault liability in exchange for a cap on recoveries. Instead, FELA requires proof of railroad negligence and allows traditional tort damages. As a result, FELA plaintiffs must prove "causation, i.e., the relation of the negligence to the injury." *Sorrell*, 549 U.S. at 169. As to the element of causation, shortly after FELA's enactment, this Court held that a plaintiff proceeding under FELA must prove that the injury flows proximately from the railroad's negligence. *E.g.*, *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 118-20 (1913); *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913).

More than 40 years later, in *Rogers* v. *Missouri Pacific Railroad*, this Court stated that in actions under FELA "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought." 352 U.S. at 508 (emphasis added). In the wake of this statement from *Rogers*, lower federal and state courts have applied differing standards to the element of causation under FELA. *Sorrell*, 549 U.S. at 173 n.* (Souter, J., concurring).

As to the element of negligence, a FELA plaintiff may establish negligence by demonstrating that the railroad violated a safety statute, thereby making the railroad *per se* negligent. See *Urie*, 337 U.S. at 174. One such safety statute is the LIA (originally the Boiler Inspection Act), which requires railroads to keep locomotives "in proper condition and safe to

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also "abolished the fellow servant rule . . . , prohibited employers from contracting around the Act, and abolished the assumption of risk defense." *Sorrell*, 549 U.S. at 168.

operate without unnecessary danger of personal injury." 49 U.S.C. § 20701(1). To implement this statutory command, the FRA promulgated 49 C.F.R. § 229.43(a), which provides:

> Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions.

Id. FRA explained when it adopted the current version of § 229.43 that "it is impossible to prevent the entry of some fumes into the cab in certain unusual wind and weather conditions." 45 Fed. Reg. 21,092, 21,098 (Mar. 31, 1980). Specifically, in a Report to Congress, FRA explained that it "employs the OSHA criteria to determine compliance with the Locomotive Inspection Act." Pet. App. 46a; *id.* at 50a ("FRA will also continue to apply OSHA criteria as reference standards to determine compliance with the Locomotive Inspection Act.").

In response to a request for clarification of the requirements of § 229.43(a), FRA explained that it enforces this regulation "by closely inspecting the exhaust system of the locomotive" for defects that result in "exhaust gas discharge into the engine compartment." Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment on Count Two, Ex. C at 1, *Battaglia* v. *Conrail*, No. CI 05-5191 (Ct. Com. Pl. Lucas County, Ohio Feb. 8, 2007) ("Defendants' Brief in Opposition Count Two"). FRA likewise explained that the phrase "'to prevent entry of the products of combustion into the cab' only relates to the height of the exhaust stacks." *Id.* According to FRA, "[i]f the gases are released from a stack of suitable height but some small amount of gas

migrates into the cab of the hauling locomotive . . . because of wind currents the FRA would find this acceptable." *Id.*, Ex. C at 2. Further, if the levels of exhaust gases in the locomotive cab "are less than the standards set forth in the Occupational Safety and Health Administration regulations, no action is required." *Id.*

B. Factual Background

Respondent Battaglia worked for Conrail as a brakeman from 1976 to 1979 and from 1988 to 1993. Pet. App. 2a ¶2. Following training in 1993, Battaglia was promoted to locomotive engineer and remained in that position until November 2007. *Id.* Respondent claims that during his time as a locomotive engineer, diesel exhaust from the locomotive would enter the locomotive cab in which he worked and that he developed asthma as a result. *Id.* at 2a-3a ¶¶ 3-4. Battaglia stated that the level of exhaust in the cab would decrease if the windows of the locomotive were closed. Plaintiff's Motion for Summary Judgment on Count Two, Ex. A at 77, *Battaglia* v. *Conrail*, No. CI 05-5191 (Ct. Com. Pl. Lucas County, Ohio Jan. 26, 2007) ("Plaintiff's Motion for Summary Judgment").

Prior to his work at the railroad, Battaglia worked as an aircraft electrician, during which time he had significant exposure to asbestos. Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment on Count One, Ex. C at 2, *Battaglia* v. *Conrail*, No. CI 05-5191 (Ct. Com. Pl. Lucas County, Ohio Sept. 10, 2007) ("Defendants' Brief in Opposition Count One"). Battaglia also smoked a pack of cigarettes each day for 13 years. *Id.* Battaglia was diagnosed with adult onset asthma, although subsequent physicians have diagnosed him with emphysema rather than asthma. *See* Brief of

Consol. Rail Corp. at 4, *Battaglia* v. *Consol. Rail Corp.*, No. L-08-1332 (Ohio Ct. App. Jan. 2, 2009) ("Conrail Br."); Reply Brief of Consol. Rail Corp. at 7, *Battaglia* v. *Consol. Rail Corp.*, No. L-08-1332 (Ohio Ct. App. Mar. 16, 2009) ("Conrail Reply Br.").

C. Proceedings Below

1. On September 9, 2005, Battaglia filed suit in the Court of Common Pleas of Lucas County, Ohio, alleging that exposure to diesel exhaust had caused his asthma. Pet. App. 3a ¶ 5. He asserted LIA and FELA claims, alleging both that the railroad violated the LIA through 49 C.F.R. § 229.43, and that this violation had a sufficient causal relationship to his injuries to warrant relief under FELA.

Battaglia moved for summary judgment on his LIA claim. He first argued that, under § 229.43, petitioner "had an absolute duty to prevent diesel fumes from entering the cab while the Plaintiff's decedent [sic] was working . . . ." Plaintiff's Motion for Summary Judgment at 12. According to Respondent, § 229.43 does not "permit 'some,' or 'limited,' or even '*reasonable*' amounts [of diesel exhaust] to be emitted within the cab." *Id.* at 11 (emphasis added). Rather, he argued that the LIA imposes "[s]trict liability . . . based merely on the fact that the exhaust was present in the cab in violation of federal regulations under regular operating conditions." *Id.*[2]

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[2] Conrail disputed respondent's reading of the requirements of the LIA and highlighted that the FRA has interpreted § 229.43 to permit some levels of diesel exhaust in locomotives so long as they are below the permissible levels adopted by OSHA. Pet. App. 30a-31a; *id.* at 8a.

On the issue of causation, Battaglia relied exclusively on a report from his expert Dr. Kelly, who had been retained to offer a medical opinion "regarding the possible causes of Francis Battaglia's asthma." Plaintiff's Motion for Summary Judgment, Ex. C ¶ 3. When Dr. Kelly initially examined Battaglia, he concluded that Battaglia suffered from asbestosis as well as "noise induced hearing loss" given his "history of work-related noise exposure." See Defendants' Brief in Opposition Count One, Ex. C at 4. In support of summary judgment, however, Dr. Kelly submitted a second report in which he concluded that Battaglia's exposure to "diesel exhaust" was "a significant factor in the development of his asthma." Plaintiff's Motion for Summary Judgment, Ex. C ¶ 7.[3]

Based on Dr. Kelly's second report, Battaglia argued that, as a matter of law, "[e]xposure to diesel exhaust contributed to Mr. Battaglia's asthma." Plaintiff's Motion for Summary Judgment at 12. Battaglia candidly acknowledged that "it may be very possible that there were other causes that *also* contributed to his asthma," but they were irrelevant because "under the FELA, the railroad is liable for Mr. Battaglia's damages if the exposure to diesel exhaust *contributed to any degree*, even the slightest, to Mr. Battaglia's asthma." *Id.* (emphasis in original). Respondent stressed that, under FELA,

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[3] Conrail disputed Battaglia's showing as to causation through the reports of its own experts, Dr. David Rosenberg and Dr. Laura Green, both of which stated that diesel exhaust had not played any role in Battaglia's alleged injuries. Pet. App. 32a. The trial court, however, refused to credit Conrail's expert reports because they were not sworn, and persisted in doing so even after Conrail submitted affidavits by these experts adopting their expert opinions. Pet. App. 12a.

"[i]n establishing causation, [he] need not prove that exposure to diesel exhaust was the proximate cause of Mr. Battaglia's asthma." *Id.* at 13.[4]

The trial court granted summary judgment to respondent on his LIA claim. It rejected Petitioner's showing regarding the FRA's interpretation of 49 C.F.R. § 229.43(a) because it found "that the regulation is clear and unambiguous – products of combustion shall be released entirely outside the cab." Pet. App. 31a. As a result, it declined to "give deference to FRA's interpretation of the regulation" and concluded that exposure to diesel exhaust, at any level, while in a locomotive cab violated 49 C.F.R. § 229.43. Pet App. 31a.

As to causation, the court also concluded that Petitioner "is liable if the exposure contributed to any degree, even the slightest, to Plaintiff's asthma." Pet. App. 32a. The trial court held that plaintiff satisfied that burden by crediting the opinion of Respondent's expert that his "'exposure to diesel exhaust . . . was a significant factor in the development of his asthma.'" *Id.* The trial court ruled "that Plaintiff's exposure to the diesel exhaust fumes contributed to his asthma" and therefore "Plaintiff is entitled to judgment as a matter of law." *Id.* at 33a.

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[4] Respondent further argued that in *Rogers*, this Court "held that to establish liability under the FELA, the relevant inquiry is 'whether negligence of the employer *played any part, however small,* in the death or injury which is the subject of the suit." Plaintiff's Motion for Summary Judgment at 12 (citing *Rogers*, 352 U.S. at 508). Respondent included a copy of *Rogers* as an exhibit to his motion and argued that *Rogers*, is "likely the most referred to and cited case by both Federal and State Courts respecting the FELA." *Id.* at 12 n.53.

After the trial court's initial summary judgment ruling, plaintiff moved for summary judgment on the FELA claim arguing that the grant of summary judgment based upon the violation of the LIA resulted in *per se* liability under FELA. The court granted summary judgment on plaintiff's FELA claim. Pet. App. 37a-38a. The case proceeded to a damages-only trial, where a jury awarded plaintiff $2,600,000 in damages.

2. On appeal, Conrail explained that the trial court erred by adopting both an erroneous causation standard under FELA and an erroneous interpretation of the requirements of the LIA.

Conrail argued that the causation standard applied by the trial court – "contributed to any degree, even the slightest" – applies only when deciding whether there is sufficient evidence for a plaintiff "to survive summary judgment." Conrail Br. at 15. Conrail specifically argued that the "any part, even the slightest" language from *Rogers* was not the standard for proving causation because FELA requires a plaintiff to "prove that 'negligence was the proximate cause in whole or part' of the employee's injury." Conrail Reply Br. at 4-5 (quoting *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944)).

Likewise, Conrail argued that the "FRA has determined that the mere presence of diesel exhaust in the cab of a locomotive does not constitute a violation . . . of the regulatio[n] set forth in 49 C.F.R. § 229.43(a)." Conrail Br. at 7. Conrail explained that the FRA "utilizes the standards set forth by OSHA to determine compliance with the LIA." *Id.* at 10.

The Ohio Court of Appeals affirmed. It held that the standard for causation under FELA is that "[a]n injury sustained by a railroad worker that is caused

in any degree, even the smallest, by the negligence of the employer, results in the obligation of the employer to pay damages." Pet. App. 11a ¶ 40 (citing *Rogers*, 352 U.S. at 508). According to the Court of Appeals, under *Rogers*, "when a railroad's negligence, in any degree, contributes to an injury at issue in a FELA claim, liability adheres to the railroad." *Id.* at 7a ¶ 26.

The Court of Appeals also ruled that 49 C.F.R. § 229.43 prohibits the presence of any diesel exhaust in a locomotive cab. Pet. App. 10a-11a ¶ 38. The court of appeals did not address the FRA's interpretation of this Rule. Specifically, it did not assess whether the exhaust allegedly entered the cab after being released from the exhaust stack or whether it entered the cab directly from the locomotive's exhaust system. Nor did the court evaluate whether the diesel exhaust exceeded the threshold standards set forth by OSHA. Instead, the court of appeals ruled that "the intent of the rule is to protect occupants of a locomotive cab from exposure to toxic exhaust emissions during normal operating conditions." *Id.* The court stated that the rule "direct[s] that such exhaust be released entirely outside the cab and that the railroad shall vent the exhaust through stacks of sufficient height or to provide 'other means' to prevent the exhaust from entering the cabin in normal operation." *Id.* According to the court of appeals, "if during normal operation exhaust enters the cab, the rule is violated." *Id.*

3. The Ohio Supreme Court declined to review the decision of the court of appeals, with three justices dissenting.

REASONS FOR GRANTING THE PETITION

The petition should be granted to resolve two issues of nationwide importance. First, the decision below implicates a deep division of authority among the lower federal and state courts on the issue whether a plaintiff must establish proximate causation as an element of his or her claim under FELA. That conflict turns on a determination whether this Court's decision in *Rogers* "relaxes" a plaintiff's traditional requirement to prove proximate causation in an action under FELA. As Justice Souter explained in *Sorrell*, confusion surrounding this Court's decision in *Rogers* has led to a deep division among lower courts over the question whether FELA requires a showing of traditional proximate cause or, conversely, whether it requires only a showing of "slight" cause. See 549 U.S. at 173 n.* (Souter, J., concurring) (recognizing division of authority).

The state supreme courts of Iowa, Minnesota, Montana, Nebraska, Utah, and West Virginia have all held that a FELA plaintiff must establish that their injuries were the proximate result of the defendant's action. In contrast, the Second, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits have all concluded that *Rogers* relaxed the common law requirement, and that FELA requires plaintiffs to prove only "slight cause." Certiorari is necessary to clarify that FELA plaintiffs must prove that their injuries were the proximate result of a railroad's negligent actions.

Resolution of this conflict is critical because of the dispositive and recurring nature of this issue; causation will be at issue in nearly every FELA case. The difference between the two standards for causation has proven outcome determinative in a large number of cases. In this case, respondent

highlighted that he was not required to prove "proximate causation" and relied heavily upon the "relaxed standard of causation under the FELA" to support his argument that "exposure to diesel exhaust contributed to any degree, even the slightest, to Mr. Battaglia's asthma." Plaintiff's Motion for Summary Judgment at 12. The trial court and court of appeals agreed that summary judgment on causation was appropriate because the single expert's opinion met the relaxed "contributed to any degree, even the slightest" standard those courts derived from *Rogers*. As such, the judgment below fundamentally depends on whether proximate causation is an element of a plaintiff's case under FELA.

Second, this Court's review is warranted in light of the lower courts' refusal to consider the federal agency's interpretation of the requirements of that agency's regulation. Conrail showed that, in assessing whether a railroad has violated 49 C.F.R. § 229.43(a), the FRA "employs [OSHA's] criteria" regarding "workplace concentration limits" for the "common products of diesel fuel combustion" in order "to determine compliance with the Locomotive Inspection Act." The court below ignored the FRA's interpretation, and instead concluded *de novo* that entry of *any* diesel exhaust into a locomotive cab violates the LIA, even if the levels are below the thresholds adopted by OSHA, and thereby imposes per se liability on the railroad.

In reaching this conclusion, the courts below ignored this Court's cases holding that deference must be accorded to an expert agency's interpretation of its own regulations. Instead, the courts below adopted an interpretation of an FRA regulation that imposes liability without any showing that employees

are exposed to conditions that create "unnecessary danger of personal injury." 49 U.S.C. § 20701(1). That ruling places substantial and unwarranted burdens on railroad carriers that stand in stark contrast to the FRA's conclusion regarding the burdens imposed by this regulation. Review of this issue is warranted because the ruling below conflicts with the controlling interpretive rules set forth by this Court.

In tandem, these two rulings make it virtually impossible for a railroad to defend itself against a claim of injury based on diesel exhaust fumes. The plaintiff need only prove some exposure, which will be based solely on his or her testimony, and have an expert say that the exposure contributed at least "slightly" to the plaintiff's condition. Railroads will have liability imposed without the benefit of a trial, and the only issue for the jury will be the size of the damages. That is not the liability scheme that Congress created in enacting FELA and this Court should intervene now to rectify this harmful and unwarranted situation.

I. THE DECISION BELOW IMPLICATES A DEEP CONFLICT OVER THE ISSUE WHETHER PROXIMATE CAUSATION IS AN ELEMENT IN A CASE UNDER FELA.

Review is warranted because there is a deep and persistent conflict on the issue whether a plaintiff is required to establish proximate causation as an element under FELA. A host of state Supreme Courts have held that proximate causation is an element under FELA. In contrast, a number of federal courts of appeals have held that the relaxed "slight" cause standard set forth in this Court's decision in *Rogers* properly states a plaintiff's obligation as to causation in a FELA case. Review is

especially warranted because a number of courts have acknowledged the competing concurring opinions in *Sorrell*, but those courts deemed themselves without authority to depart from their interpretation of *Rogers* absent an express ruling from this Court. Resolution of this conflict will have a broad impact on cases across the country in which courts and juries must decide whether the evidence is sufficient to establish causation under FELA.

A. There Is A Deep Division Of Authority Over The Standard For Proving Causation Under FELA.

1. As Justice Souter thoroughly documented in his concurring opinion in *Sorrell*, there is a very mature conflict in the federal and state lower courts over whether plaintiffs under FELA must prove that their injuries were proximately caused, in whole or in part, by the defendant's negligence.

Most recently, the Utah Supreme Court followed Justice Souter's concurrence in holding that plaintiffs proceeding under FELA must prove that employer negligence proximately caused the plaintiff's injuries. Recognizing the "extensive debate" over the importance of the phrase "even the slightest" from *Rogers*, the court determined that "[w]hile one could certainly read the Supreme Court's language in *Rogers* to speak to the standard of causation under FELA, this is not the best reading of the case." *Raab* v. *Utah Ry.*, 221 P.3d 219, 229 (Utah 2009). The court concluded that FELA requires a plaintiff to prove proximate causation based on its finding that "there is no [ ] statutory support for reading *Rogers* as eliminating the requirement of proximate causation" and that such a holding "would be contrary to the Supreme Court's approach to FELA." *Id.* at 229-30.

Even before *Sorrell*, substantial authority supported the conclusion that *Rogers* did not "relax" the common-law standard of causation for actions under FELA. In *Marazzato* v. *Burlington Northern Railroad*, for example, the Montana Supreme Court held that a plaintiff proceeding under FELA "has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's" injury. 817 P.2d 672, 675 (Mont. 1991) (internal quotation marks omitted). Like the Utah Supreme Court, the court in *Marazzato* rejected the argument that *Rogers* abridged the common-law requirement to prove proximate causation. Rather, the court concluded that *Rogers* dealt with the unrelated issues of multiple causation and contributory negligence. The supreme courts of Iowa, Minnesota, Nebraska, and West Virginia have likewise held that FELA plaintiffs must prove that employer negligence proximately caused their injuries.[5]

2. In contrast, other courts have relied upon language in *Rogers* to hold that FELA abrogates the common-law requirement of proximate causation in favor of a "relaxed" standard of causation. These

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[5] *See Gardner* v. *CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997) (requiring, under FELA, that negligence "contributed proximately, in whole or in part, to plaintiff's injury"); *Snipes* v. *Chi., Cent. & Pac. R.R.*, 484 N.W.2d 162, 164 (Iowa 1992) (requiring, under FELA, that negligence "proximately caused, in whole or in part, the accident"); *Chapman* v. *Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991) (ruling that FELA requires that employer's negligence "is a proximate cause of the employee's injury"); *Brabeck* v. *Chi. & Nw. Ry.*, 117 N.W.2d 921, 923 (Minn. 1962) (ruling that liability under FELA attaches only if the conduct is "proximate cause of an accident"); *cf. Reed* v. *Pa. R.R.*, 171 N.E.2d 718, 720-21 & nn.2-3 (Ohio 1961) ("relaxed" standard in *Rogers* applies only to assess whether plaintiff's evidence creates a jury question).

courts, including the courts in this case, align themselves with Justice Ginsburg's concurrence in *Sorrell*, see 549 U.S. at 180, in holding that "[a]n injury sustained by a railroad worker that is caused in any degree, even the smallest, by the negligence of the employer results in the obligation of the employer to pay damages." Pet. App. 11a ¶ 40 (citing *Rogers*, 352 U.S. at 508).

Most recently, the Seventh Circuit held that "common-law proximate causation is [not] required to establish liability under the FELA." *McBride* v. *CSX Transp., Inc.*, 598 F.3d 388, 406 (7th Cir. 2010). The court conceded the "considerable force" of Justice Souter's concurrence in *Sorrell*, but declined to "embrac[e] Justice Souter's view at this juncture." *Id.* at 404. That court highlighted that lower courts "have been admonished not to anticipate future actions of the Supreme Court" for "'it is [the Supreme Court's] prerogative alone to overrule one of its precedents.'" *Id.* at 405 (quoting *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997)). As a result, the Seventh Circuit joined the federal and state jurisdictions embracing the "relaxed" standard of causation in FELA actions, largely based on its own previous interpretations of several of this Court's precedents. *See id.* at 405-06.

Specifically, the Second, Fifth, Sixth, Ninth, Tenth, and District of Columbia Circuits treat *Rogers* as establishing that a FELA plaintiff need only prove that the railroad's negligence was the "slightest cause" of the employee's injuries.[6] The same is true

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[6] *See Williams* v. *Long Island R.R.*, 196 F.3d 402, 406-07 (2d Cir. 1999) (applying "relaxed standard" of causation to claim under FELA); *Summers* v. *Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606-07 (10th Cir. 1997) (ruling that the Supreme Court

of courts in Alabama, the District of Columbia, Florida, Mississippi, South Carolina, Texas, and Washington.[7]

These jurisdictions view *Rogers* as having established that "'proximate cause' is not required to establish causation under FELA." *Ogelsby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 609 (9th Cir. 1993); see *Montgomery* v. *CSX Transp.*, 656 S.E.2d 20, 28 & n.6 (S.C. 2008) (relying on Justice Ginsburg's *Sorrell* analysis in affirming South Carolina's use of a "relaxed" causation standard in actions under FELA). They rely almost entirely on the "even the slightest" language from *Rogers*, and to the extent they reference FELA's statutory text at all, they cite only to FELA's "in whole or in part" language as the basis for a "relaxed" standard of causation. *E.g.*, *Williams* v. *Long Island R.R.*, 196 F.3d 402, 406 (2d Cir. 1999). As Justice Souter's *Sorrell* concurrence makes clear, this interpretation fundamentally misconstrues both the statutory text and *Rogers* itself.

"definitively abandoned" "proximate causation" in FELA cases in *Rogers*); *Ogelsby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 609 (9th Cir. 1993) (ruling that "'proximate cause' is not required to establish causation under the FELA"); *Little* v. *Nat'l R.R. Passenger Corp.*, 865 F.2d 1329 (D.C. Cir. 1988) (per curiam) (Table); *See also Johnson* v. *Cenac Towing, Inc.*, 544 F.3d 296, 302 & n.4 (5th Cir. 2008) (applying *Rogers* causation standard to claim under the Jones Act); *Churchwell* v. *Bluegrass Marine, Inc.*, 444 F.3d 898, 907 (6th Cir. 2006) (same).

[7] *See Montgomery* v. *CSX Transp.*, 656 S.E.2d 20, 26, 28 & n.6 (S.C. 2008); *Canadian Nat'l/Ill. Cent. R.R.* v. *Hall*, 953 So.2d 1084, 1091 (Miss. 2007); *Glass* v. *Birmingham S. R.R.*, 905 So.2d 789, 796 (Ala. 2004); *Keranen* v. *Nat'l R.R. Passenger Corp.*, 743 A.2d 703, 712 (D.C. 2000); *Seeberger* v. *Burlington N. R.R.*, 982 P.2d 1149, 1152 (Wash. 1999); *Maritime Overseas Corp.* v. *Ellis*, 971 S.W.2d 402, 406 (Tex. 1998); *McCalley* v. *Seaboard Coast Line R.R.*, 265 So.2d 11, 14-15 (Fla. 1972); *Wilmoth* v. *Chi., Rock Island & Pac. R.R.*, 486 S.W.2d 631, 634 (Mo. 1972).

3. The division of authority has deepened in the wake of this Court's decision in *Sorrell*. See, *e.g.*, *Raab*, 221 P.3d at 227 & nn.28-29 (recognizing division of authority); *Montgomery*, 656 S.E.2d at 28 & n.6 (same); *In re GlobalSanteFe Corp.*, 275 S.W.3d 477, 489 n.79 (Tex. 2008) (same). And it has become so profound that courts within certain states now apply differing standards to this same statute, depending on whether a case is filed in state or federal court. Compare *Raab*, 221 P.3d at 229 (Utah 2009), with *Summers* v. *Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997); compare *Marazzato*, 817 P.2d at 675 (Mont. 1991), with *Ogelsby*, 6 F.3d at 609 (9th Cir. 1993). This is unquestionably the most intolerable situation because it means that a plaintiff can prevail in one courthouse and lose in another that is located literally across the street. It is bad enough to think that a plaintiff's place of residence can dictate the outcome of a case, but beyond that, the street address of the court now controls the merits of FELA litigation.

The extent of the lower court's decisional division underscores its significance. The proper standard of causation arises in every case brought under FELA. Hundreds of FELA cases are filed each year in federal court alone.[8] Many other FELA claims are asserted in state court. In light of the uncertainty over the proper standard of causation created by *Sorrell*, both plaintiffs and defendants legitimately can seek a favorable causation instruction, incentivizing litigation of this issue in every FELA

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[8] *See* Admin. Office of U.S. Courts, *Annual Report of the Director: Judicial Business of the United States Courts*, tbl.C-2A at 144 (2009), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/appendices/C02ASep09.pdf (more than 3000 federal FELA cases filed from 2005-2009).

case until a clear precedent is established by this Court.[9]

4. This case presents an ideal vehicle to resolve this deep and abiding conflict.

For example, in *Syverson* v. *Consolidated Rail Corp.*, the Second Circuit reversed summary judgment for the railroad, noting that while it would have affirmed dismissal "had this been a negligence action at common law," reversal was required under FELA's "substantially diluted" and "relaxed" causation standard. 19 F.3d 824, 825-28 (2d Cir. 1994) (explaining that FELA permits liability "for risks that would be too remote to support liability under common law"). This case presents the converse situation. In his motion for summary judgment, Respondent argued that "[i]n establishing causation, [Respondent] need not prove that exposure to diesel exhaust was the proximate cause of [his] asthma." Plaintiff's Motion for Summary Judgment at 13. Indeed, Respondent predicated his summary judgment argument on the "relaxed standard of causation under the FELA," *id.*, and acknowledged that "it may be very possible that there were other causes that *also* contributed to his asthma" but they were irrelevant because "[u]nder the FELA, the railroad is liable for Mr. Battaglia's damages if the exposure to diesel exhaust *contributed to any degree*, even the slightest, to Mr. Battaglia's asthma." *Id.* at 12.

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[9] Moreover, every case brought under the Jones Act, 46 U.S.C. § 30104, the federal law governing liability for workplace injuries to seamen, is subject to the same standards and judicial interpretations that apply to FELA. *See Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 456 (1994) (noting that the Jones Act "adopts the entire judicially developed doctrine of liability under [FELA]") (internal quotation marks omitted).

The courts below agreed and granted summary judgment because they concluded that under FELA, a "railroad is liable if the exposure contributed to any degree, even the slightest, to Plaintiff's asthma." Pet. App. 32a; *id.* at 11a ¶ 40 ("An injury sustained by a railroad worker that is caused in any degree, even the smallest, by the negligence of the employer, results in the obligation of the employer to pay damages"). Measured against that standard, the courts below ruled that the affidavit of plaintiff's retained expert – who stated that Battaglia's "exposure to diesel exhaust, as a result of his work on the railroad, was a significant factor in the development of his asthma," Plaintiff's Motion for Summary Judgment, Ex. C ¶ 7 – was sufficient to satisfy the necessary "nexus" set forth in cases such as *Rogers* between Respondent's exposure and his alleged asthma. Pet. App. 9a ¶ 33.[10] Given the concession that there were other potential causes of plaintiff's condition, this case should have gone to a jury.

Moreover, under Ohio and federal law, when reviewing a motion for summary judgment, courts are required to "'view the evidence presented through the prism of the substantive evidentiary burden.'" *Myocare Nursing Home, Inc.* v. *Fifth Third Bank*, 787 N.E.2d 1217, 1222 (Ohio 2003) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986)). Here, there can be no dispute that the courts below denied Conrail a jury trial on the question of causation based on their holdings that the "relaxed" standard of

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[10] The courts below did not consider whether Dr. Kelly's affidavit could satisfy a heightened "proximate cause" standard. Indeed, as noted, Respondent underscored in his motion that he was not obligated to "prove that exposure to diesel exhaust *was* the proximate cause of Mr. Battaglia's asthma." Plaintiff's Motion for Summary Judgment at 13.

causation set forth in *Rogers* governed whether plaintiff had met his burden of showing that exposure to diesel exhaust caused Battaglia's alleged injuries. As a result, adoption of the traditional common-law proximate causation standard in this case requires the Court to vacate the judgment and permit the case to be tried. *E.g.*. *Sorrell*, 549 U.S. at 172 (vacating judgment of state court and remanding "for further proceedings not inconsistent with this opinion").[11]

B. The Decision Below Conflicts With Binding Precedents Of This Court.

Review also should be granted because, contrary to the decisions below, this Court's precedent firmly establishes that a FELA plaintiff must prove proximate causation. See, *e.g.*, *Tennant* v. *Peoria & Perkin Union Ry.*, 321 U.S. 29, 32 (1944) (interpreting FELA as requiring plaintiffs to prove that "negligence was the proximate cause in whole or in part" of the employee's injury); *accord Brady* v. *S. Ry.*, 320 U.S. 476, 483 (1943) (a railroad's action is "the proximate cause of an injury" only if it was "the natural and probable consequence of the negligence" and "ought to have been foreseen in the light of the attending circumstances" (internal quotation omitted)).

This long-recognized rule reflects that it is "clear common law that a plaintiff had to prove that a

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[11] For example, under Ohio law, an expert's statement that an alleged defect was a "significant factor" in causing a plaintiff's injury has been held to be inadequate to satisfy the requirement of proximate causation. *See Rhodes* v. *Firestone Tire & Rubber Co.*, No. 08AP-314, 2008 WL 4368480, at *3-4 (Ohio Ct. App. Sept. 25, 2008) (holding that an expert report stating that a defect in a tire was a "significant factor" in a tire failure was insufficient to establish proximate causation).

defendant's negligence caused his injury proximately, not indirectly or remotely," *Sorrell*, 549 U.S. at 173 (Souter, J., concurring), and that this common law standard has not been "expressly rejected in the text of [FELA]," see *Gottshall*, 512 U.S. at 544. Accordingly, this Court has "consistently recognized and applied proximate cause as the proper standard in FELA suits." *Sorrell*, 549 U.S. at 174 (Souter, J., concurring).

The Court's decision in *Davis* v. *Wolfe*, 263 U.S. 239 (1923), illustrates the fundamental role of proximate cause under FELA:

> [A]n employee cannot recover under [FELA] if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him[.]

Id. at 243. Decisions from this Court preceding,[12] and following *Davis*,[13] likewise recognize that liability

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[12] *See, e.g.*, *Norfolk & W. Ry.*, 229 U.S. at 118-120; *St. Louis, Iron Mountain & S. Ry.*, 229 U.S. at 280; *Lang* v. *N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921).

[13] *See, e.g.*, *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Goneau*, 269 U.S. 406, 410-11 (1926); *St. Louis-S.F. Ry.* v. *Mills*, 271 U.S. 344, 347 (1926); *N.Y. Cent. R.R.* v. *Ambrose*, 280 U.S. 486, 489 (1930); *Nw. Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934); *Swinson* v. *Chi., St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935); *Tiller* v. *Atl. Coast Line R.R.*, 318 U.S. 54, 67 (1943); *Brady*, 320 U.S. at 483; *Coray* v. *S. Pac. Co.*, 335 U.S.

under FELA is limited to injuries that a defendant's negligence proximately causes. These cases remain binding precedent.

Some courts, however, have misread *Rogers* to have overturned *sub silentio* nearly a half century of this Court's FELA precedents. But *Rogers* is entirely consistent with the long line of this Court's decisions requiring FELA plaintiffs to prove proximate causation. *Rogers* addressed the distinct issue of whether a FELA plaintiff has the burden to prove that a wrongful act was the "sole, efficient, producing cause of injury," a more demanding requirement than the proximate causation standard. 352 U.S. at 506. The statement in *Rogers* that FELA affixes liability on a railroad when its negligence "'played any part, even the slightest'" in the employee's injury spoke only to "the occasional multiplicity of causations." *Sorrell*, 549 U.S. at 175 (Souter, J., concurring) (quoting *Rogers*, 352 U.S. at 506). *Rogers* did not alter "the necessary directness of cognizable causation." *Id.*[14]

520, 523 (1949); *Urie*, 337 U.S. at 177; *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949).

[14] Following *Rogers*, this Court has stated in dicta that FELA adopts a "relaxed standard of causation", *Gottshall*, 512 U.S. at 543, and that a FELA plaintiff "is not required to prove common-law proximate causation," *Crane* v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166 (1969). These statements are correct, to the extent they merely acknowledge that FELA does not adopt the older common law conception of "sole proximate cause," which this Court addressed in *Rogers*. *See Sorrell*, 549 U.S. at 175 (Souter, J., concurring). But any suggestion that *Rogers* "relaxes" the federal rule of proximate causation is contrary to FELA's text and cannot be reconciled with the extensive line of this Court's precedents applying that standard under FELA.

Moreover, *Rogers* dealt with FELA's "in whole or in part" statutory language, which plainly does not alleviate a plaintiff's burden to prove proximate causation. This provision establishes only that a FELA injury can have more than one proximate cause, thereby abolishing the common law regime of pure contributory negligence. Accordingly, *Rogers* only held that a standard of "sole proximate cause" could not be reconciled with a statute adopting a standard of comparative negligence. See *Sorrell*, 549 U.S. at 175 (Souter, J., concurring).

The narrow ruling in *Rogers* simply did not reverse decades of decisions concluding that liability under FELA only exists where railroad "negligence was *the proximate cause* in whole or in part" of the employee's injury. *Tennant*, 321 U.S. at 32 (emphasis added). This is made all the more clear by the fact that *Rogers* derived its "test of a jury case" from *Coray* v. *Southern Pacific Co.*, which explicitly states that FELA requires plaintiffs to prove either that railroad negligence was "the sole or a contributory *proximate* cause" of the employee's injury. 335 U.S. 520, 523 (1949) (citing *Davis*, 263 U.S. at 243; *Spokane & Inland Empire R.R.* v. *Campbell*, 241 U.S. 497, 509-10 (1916)(emphasis added)). There is simply no basis for interpreting *Rogers*, or, for that matter, any other precedent of this Court, as unsettling the long-established proximate cause standard under FELA. *Rogers* merely made clear that in cases where a jury could find that both the employee's and the railroad's negligence could be legal causes of the injury, the claim against the railroad had to go to a jury even if the railroad's contribution to the injury were slight relative to the employee's.

At a minimum the conflicts and confusion created by *Rogers* unquestionably warrant this Court's

review, and this case, which did not even get to the jury on the issue of causation, provides an ideal vehicle for deciding the issue presented.

II. THE DECISION BELOW IMPOSING LIABILITY UNDER FELA FOR A VIOLATION OF A SAFETY REGULATION CONFLICTS WITH THIS COURT'S STANDARDS GOVERNING THE INTERPRETATION OF AN AGENCY'S REGULATIONS.

Review should be granted because the decision below conflicts with this Court's decisions holding that courts "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ.*, 512 U.S. at 512. As this Court has explained, in construing the requirements of a federal rule, "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* (internal quotation marks omitted); *accord Lyng* v. *Payne*, 476 U.S. 926, 939 (1986); *accord Bowles*, 325 U.S. at 414; Davis, *supra*, at § 7.22, 105.

The decision below violates these standards because the court of appeals never assessed whether the FRA's interpretation of § 229.43(a) was "plainly erroneous" or "inconsistent with the regulation." Instead, the court of appeals substituted its own independent judgment regarding the meaning of § 229.43(a) for that of the expert agency and then, based on that erroneous interpretation, imposed liability on the railroad. The court of appeals did not assess whether the exhaust allegedly entered the cab after being released from the exhaust stack or whether it entered the cab directly as a result of a defect in the locomotive's exhaust system. Likewise, the court did not evaluate whether the diesel exhaust exceeded the threshold standards set forth by OSHA.

Instead, according to the Ohio Court of Appeals, "it is clear that the intent of the rule is to protect occupants of the cab of a locomotive from exposure to *toxic* exhaust emissions during normal operating conditions." Pet. App. 10a-11a ¶ 38 (emphasis added). As a result, the court saw "no ambiguity" and ruled that, regardless of the point of entry, "if during normal operation exhaust enters the cab, the rule is violated." *Id.*

In marked contrast, the FRA has interpreted § 229.43(a) in these circumstances to require compliance with the "limits for the concentration" set forth by OSHA for the "common products of diesel fuel combustion." Pet. App. 45a-46a; *id.* at 50a ("FRA also will continue to apply OSHA criteria as reference standards to determine compliance with the [LIA]"). By tying compliance to the levels of exposure identified as acceptable by OSHA, the FRA's interpretation of § 229.43 properly takes into account concerns regarding exposure to levels of diesel exhaust deemed "toxic" by OSHA while recognizing that "it is impossible to prevent the entry of some fumes into the cab in certain unusual wind and weather conditions." 45 Fed. Reg. at 21,098. FRA's interpretation is thus faithful to the language of § 229.43(a), addresses the core concern of exposure to "toxic" levels of diesel exhaust and is therefore reasonable under the circumstances. The FRA's interpretation of Section 229.43(a) thus should have been accorded "controlling weight." *Thomas Jefferson Univ.*, 512 U.S. at 512.

In contrast, the court of appeals' decision effectively requires railroads to insure that locomotive cabs are airtight or risk liability whenever diesel exhaust at any level is able to make its way inside the

locomotive cab.[15] Indeed, the court of appeals embraced Battaglia's position that § 229.43 "doesn't permit 'some,' or 'limited,' *or even 'reasonable' amounts* to be emitted within the cab." Plaintiff's Motion for Summary Judgment at 11. As a result, the court of appeals adopted a *per se* standard under which Petitioner is liable "based merely on the fact that the exhaust was present in the cab in violation of federal regulations under regular operating conditions." *Id.*[16]

This is a virtually impossible standard for railroads to defend, and effectively renders every locomotive in possible violation of a federal safety regulation. The decision below requires railroads to insure that locomotive cabs are airtight or risk liability whenever diesel exhaust at any level is able to make its way inside the locomotive cab. Cf. *Dixson* v. *Burlington N. R.R.*, 795 F. Supp. 939, 940 (D. Neb. 1992) (holding that § 229.43 is ambiguous as to whether it applies only to the lead locomotive). Even if the court of appeals' reading were a permissible one, the decision below ignores that the FRA is responsible for deciding "which among several competing interpretations best serves the regulatory purpose." *Thomas Jefferson Univ.*, 512 U.S. at 512.

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[15] *Kayner* v. *Union Pac. R.R.*, No. 1003141, 2006 WL 4606753 (Dist. Ct. Douglas County, Neb. Mar. 2, 2006) (noting that "the LIA regulation, 49 C.F.R. 229.43, does not provide that the cab must be entirely free of all diesel exhaust, . . . only that the locomotive exhaust stacks be of sufficient height to allow the diesel exhaust to be released entirely outside the cab and to prevent reentry of the exhaust under usual operating conditions").

[16] Plaintiff put forth no quantitative evidence regarding the level of his exposure to diesel exhaust, and never argued that it exceeded the thresholds adopted by OSHA.

Review should be granted because the court of appeals' refusal to defer to the FRA's interpretation of § 229.43(a) conflicts with this Court's long-standing precedent governing the interpretation of federal regulations. Moreover, the draconian interpretation of the regulation coupled with the rejection of a requirement of proximate causation eviscerates the requirement that employees are only entitled to damages for injuries that are the product of a railroad's negligence. The regime in Ohio makes the railroad the guarantor of its employees' health, even when there clearly are multiple potential causes of injury. This is not the liability scheme that Congress implemented in the FELA and only review by this Court can put FELA back on the right course.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

THE SUPREME COURT OF OHIO

[Filed FEB. 10, 2010]

Case No. 2009-2148

FRANCIS BATTAGLIA

v.

CONRAIL *et al.*

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

(Lucas County Court of Appeals; No. L081332)

/s/ THOMAS J. MOYER
THOMAS J. MOYER
Chief Justice

APPENDIX B

Court of Appeals of Ohio,
Sixth District, Lucas County.

No. L-08-1332.

FRANCIS BATTAGLIA,

Appellee,

v.

CONRAIL, *et al.*,

Appellant.

Decided Oct. 16, 2009.

SINGER, J.

{¶ 1} A railroad appeals a $2.6 million workplace injury award issued in the Lucas County Court of Common Pleas to a former railroad employee. For the reasons that follow, we affirm.

{¶ 2} Appellee, Francis Battaglia, began work for appellant, Consolidated Rail Corp. ("Conrail") in 1976 as a brakeman. In 1979, appellant furloughed him. He did not work for any railroad again until 1988, when he was called back. Between 1988 and 1993, he was a brakeman and a conductor. Following training, in 1993, appellee became a locomotive engineer, a position he held until 2007, when he received medical leave.

{¶ 3} According to appellee, during his tenure with the railroad, he was continuously exposed to diesel exhaust which would infiltrate into the locomotive cab through holes in the floor, cracks in improperly

sealed windows and doors and through the equipment compartment. In his deposition testimony, appellee reported that he frequently complained about this condition, but repairs were ineffective.

{¶ 4} At some point, appellee began to experience respiratory distress. On consultation, a pulmonologist diagnosed appellee with asthma. According to appellee, the physician advised him to retire from the railroad to escape further exposure to diesel exhaust.

{¶ 5} On September 9, 2005, appellee instituted the suit that underlines this appeal. In his complaint, appellee alleged that appellant negligently caused the conditions that caused his asthma, a claim under the Federal Employees Liability Act ("FELA"); and, in doing so, violated the terms of the Locomotive Inspection Act ("LIA"), 49 U.S.C. 20701, and regulatory railroad safety standards as articulated in Section 229 et seq., Title 49 C.F.R. Appellant responded, denying liability.

{¶ 6} Following some discovery, appellee moved for partial summary judgment. Appellant filed a memorandum in opposition. On June 15, 2007, the court granted appellee's motion, concluding that appellee's assertion of prolonged exposure to diesel exhaust fumes in the cab of his locomotive was unrefuted, as was his physician's affidavit that such exposure was a cause of his asthma. Moreover, the court concluded, the existence of diesel exhaust was a violation of the unambiguous requirements of Section 229.43(a), Title 49 C.F.R., constituting per se negligence under the LIA. Since any degree of negligence is sufficient under FELA to establish causation for an injury, the court granted appellee's motion for partial summary judgment. The court denied appellant's motion for reconsideration.

{¶ 7} On August 21, 2007, appellee moved for partial summary judgment on its FELA claim on the ground that the judgment of a violation of the LIA, already entered, constituted a per se violation of FELA. On April 8, 2008, the court granted appellee's motion and the matter went forward for a jury trial on damages only. At the conclusion of the trial, the jury awarded appellee $2.6 million. The trial court entered judgment on the verdict and denied appellant's motions for a J.N.O.V., new trial and remittitur. This appeal followed.

{¶ 8} Appellant sets forth the following nine assignments of error:

{¶ 9} "I. The trial court erred in granting summary judgment in favor of Battaglia on his LIA claim

{¶ 10} "II. The trial court erred in granting summary judgment on the issue of liability under the FELA and limiting the trial to damages only

{¶ 11} "III. The trial court erred in denying Conrail's motion or a continuance of trial due to discovery abuses

{¶ 12} "IV. The trial court erred in denying Conrail's motion to prelude [sic] the testimony of Dr. DeLara and Dr. Kelly

{¶ 13} "V. The trial court erroneously permitting [sic] exposure testimony in a damages only trial

{¶ 14} "VI. The trial court improperly instructed the jury regarding workers' compensation, emphysema, assumption of the risk and other liability points of law

{¶ 15} "VII. The trial court erred in denying Conrail's motion for directed verdict and judgment notwithstanding the verdict because of Battaglia's

failure to present evidence relating to lost wages with reasonable certainty

{¶ 16} "VIII. The jury's verdict should be reversed because it did not calculate net present value, and did not deduct local, state and federal taxes, personal consumption or other required deductions

{¶ 17} "IX. The award of $2,600,000 is against the manifest weight of the evidence, the result of speculation and undue passion and prejudice"

I. Summary Judgment

{¶ 18} In its first two assignments of error, appellant insists that the trial court's decision to grant partial summary judgment on both the LIA and FELA claims was erroneous.

{¶ 19} An appellate court examines an award of summary judgment de novo, employing the same standard as a trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 20} " * * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67; Civ.R. 56(C).

{¶ 21} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, syllabus, and identify those portions of the record that demonstrate the absence of a genuine

issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts as would be admissible in evidence showing that there is a genuine issue of material fact. Civ.R. 56(E); *Green v. B.F. Goodrich Co.* (1993), 85 Ohio App.3d 223, 228; *Riley v. Montgomery* (1984), 11 Ohio St.3d 75, 79. A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing Anderson *v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶ 22} Appellee submitted his initial motion for summary judgment accompanied by his affidavit and that of a co-worker averring that the cabs in the locomotives in which they worked were regularly, over a prolonged period, infiltrated with diesel exhaust. Also with the motion was the affidavit of physician R. Michael Kelly who stated that he had, " * * * concluded to a reasonable degree of medical certainty that Mr. Battaglia's ongoing and regular exposure to diesel exhaust, as a result of his work on the railroad, was a significant factor in the development of his asthma[.]"

{¶ 23} Appellee, citing *Lilly v. Grand Trunk Western R.R. Co.* (1943), 317 U.S. 481, 485, insisted that the Locomotive Inspection Act, originally known as the Boiler Inspection Act, imposes on a railroad an absolute duty to operate locomotives safely. Statutorily, this includes an obligation to operate a locomotive, " * * * only when the locomotive or tender and its parts and appurtenances—(1) are in proper condition

and safe to operate without unnecessary danger of personal injury[.]" Section 20701(1), Title 49, U.S.Code.

{¶ 24} Moreover, appellee asserted, diesel exhaust infiltration into a locomotive cab is also an express violation of a federal safety regulation which provides:

{¶ 25} "(a) Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions." Section 229.43(a), Title 49 C.F .R.

{¶ 26} Appellee insisted that the unrefuted presence of diesel exhaust in the locomotive cabs in which he worked constituted a breach of an absolute duty imposed by law. Pursuant to *Rogers v. Missouri Pacific R. Co.* (1957), 352 U.S. 500, 508, when a railroad's negligence, in any degree, contributes to an injury at issue in a FELA claim, liability adheres to the railroad. As a result, appellee maintained, appellant is liable for his asthma and he was entitled to summary judgment on his LIA claim.

{¶ 27} Appellant responded, asserting that there were questions of fact in three areas which would preclude summary judgment: (1) whether appellee was "exposed" to diesel exhaust, (2) whether the exhaust in the locomotive cab in which appellee worked constituted a violation of the Locomotive Inspection Act, and (3) whether appellee's asthma was caused by his exposure diesel exhaust.

{¶ 28} Appellant maintained that Section 229.43(a), Title 49 C.F.R. is ambiguous and should be interpreted in a manner consistent with that adopted by the administrative agency tasked with enforcing the

rule, the Federal Railroad Administration ("FRA"). According to an affidavit and documents from a former FRA administrator, the agency recognized that it would not be possible to eliminate all diesel fumes from the locomotive cab in some conditions.

{¶ 29} Rather than develop its own rules for limits on the concentration of fumes or regulations for air exchange rates for locomotive cabs, the agency chose to use standards promulgated by the Occupational Safety and Health Administration ("OSHA"). Since appellee failed to show that the conditions in the locomotives in which he worked exceeded the permissible exposure levels or time weight averages established by OSHA, appellant argued, appellee neither established that he was "exposed" to diesel fumes, nor that there was a violation of the regulation. Therefore, appellant failed to show a violation of the LIA.

{¶ 30} Concerning causation, appellant attached a document from an environmental expert who opined that appellee's exposure to exhaust was not likely excessive and was not at levels known to cause asthma. The asthma was likely triggered by other things, including a smoking habit that had ended 31 years earlier. Appellant also submitted a letter from a physician who opined that causation for appellee's asthma was "multifactoral," but not related to the railroad.

{¶ 31} In appellee's response, he reiterated his arguments concerning the violation of the regulation and pointed out that the reports on which appellant relied to contradict appellee's physician on the issue of causation were unauthenticated by affidavit or otherwise. Appellant, even though it filed a sur-reply

and an amended sur-reply, failed to remedy the lack of authentication for its expert reports.

{¶ 32} In its decision on appellee's motion for partial summary judgment on his LIA claim, the court concluded that Section 229.43(a), Title 49 C.F.R. is " * * * clear and unambiguous—products of combustion shall be released entirely outside the cab." Since the unrefuted affidavits of appellee and his co-worker sufficiently established that diesel exhaust was released into the cab, the court found that appellant had violated the safety regulation.

{¶ 33} Relying on *Aparicio v. Norfolk & Western Ry. Co.* (C.A.6 1996), 84 F.3d 803, for the proposition that the railroad is liable if the exhaust exposure contributed to any degree, "even the slightest" to appellee's asthma, the court found that such a nexus had been established by Dr. Kelly's affidavit. The court stated that it could not and did not consider the contradictory reports submitted by appellant, because these reports were unauthenticated by affidavit and were, thus, not in conformity with Civ.R. 56(E). On these conclusions, the court granted appellee's motion for partial summary judgment on the LIA violation claim. Appellant's motion for reconsideration and request to resubmit newly authenticated reports were rejected.

{¶ 34} Appellee subsequently moved for partial summary judgment on its FELA claim on the ground that the LIA violation triggered per se liability under FELA. This motion too was granted.

{¶ 35} Appellant claims that the trial court was wrong when it refused to consider the administrative interpretation of Section 229.43(a), Title 49 C.F.R and in rejecting consideration of their unauthenticated expert opinions on the question of causation. It also

suggests that the trial court should have accepted their resubmission with accompanying affidavits presented after summary judgment was granted.

{¶ 36} It has long been held that where a statute is unambiguous, "* * * there is no occasion for resorting to the rules of statutory interpretation. To interpret what is already plain is not interpretation, but legislation * * *. An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer* (1943), 143 Ohio St. 312, 316; *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105-106; *Barth v. Barth*, 113 Ohio St.3d 27, 2007-Ohio-973, ¶ 10, fn 1. The same applies to administrative rules properly promulgated under statutory authority. *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶ 10.

{¶ 37} Appellant has directed us to no authority that found Section 229.43(a), Title 49 C.F.R. ambiguous as it relates to a lead locomotive cab. It points to *Dixson v. Burlington Northern R. Co.* (D. Nebraska 1992), 795 F.Supp. 939, but there the district court concluded that it was not clear if the rule applies to *trailing* locomotives. Appellee points to *Norfolk Southern R. Co. v. Baker* (1999), 237 Ga.App. 292, which holds that the provision is unambiguous, but appears to do so on the basis of an evidentiary deficiency. Neither of these cases is particularly useful to our analysis.

{¶ 38} The plain language of the rule is more persuasive. Although appellant argues that the thrust of the rule is about stack heights, it is clear that the intent of the rule is to protect occupants of a locomotive cab from exposure to toxic exhaust emissions during normal operating conditions. It is directed that such exhaust be released entirely outside the cab and that the railroad shall vent the exhaust through

stacks of sufficient height or provide "other means" to prevent the exhaust from entering the cabin in normal operation. We see no ambiguity here. Clearly, if during normal operation exhaust enters the cab, the rule is violated.

{¶ 39} Appellant has never suggested that the conditions experienced by appellee were in any way the result of unusual operating conditions, nor has it presented evidence contradicting appellee's assertion of exposure. Consequently, appellee's exposure to such exhaust is a violation of a safety regulation.

{¶ 40} An injury sustained by a railroad worker that is caused in any degree, even the smallest, by the negligence of the employer, results in the obligation of the employer to pay damages. *Rogers v. Missouri Pac. R. Co.* (1957) 352 U.S. 500, 508; *Aparicio v. Norfolk & Western Ry. Co.* supra, at 808. A violation of a safety regulation constitutes negligence per se. *Walden v. Illinois Cent. Gulf R.R.* (C.A. 7 1992), 975 F.2d 361, 364, citing *Kernan v. American Dredging Co.* (1958), 355 U.S. 426, 432-433. Consequently, appellant's violation of a safety regulation establishes its negligence.

{¶ 41} Concerning causation, appellant insists that there is a question of material fact, pointing to the unsworn contradictory opinions of its medical experts. Had the court not erroneously excluded consideration of these documents, appellant maintains, there would have been a triable issue.

{¶ 42} "Documents submitted in opposition to a motion for summary judgment which are not sworn, certified, or authenticated by affidavit have no evidentiary value and may not be considered by the court in deciding whether a genuine issue of material

fact remains for trial." *Green v. B.F. Goodrich Co.* (1933), 85 Ohio App.3d 223, 228; *Citizens Ins. Co. v. Burkes* (1978), 56 Ohio App.2d 88, 95-96.

{¶ 43} Accordingly, the trial court properly excluded appellant's documents from consideration when the motion for summary judgment became decisional. Moreover, since appellant was given notice of the insufficiency of its proofs prior to its last response to the summary judgment motion and failed to remedy the deficiency, the trial court acted well within its discretion in denying it yet another bite of that apple. As a result, the court properly granted summary judgment to appellee on its LIA claim. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 44} Since liability under the LIA and FELA is coextensive, violation of the former constitutes a claim under the latter. *Urie v. Thompson* (1949), 337 U.S. 164, 194; *Lilly v. Grand Trunk Western R. Co.* (1943), 317 U.S. 481, 485. Accordingly, appellant's second assignment of error is not well-taken.

II. Motion to Continue Trial

{¶ 45} Trial on the issue of damages only was scheduled to begin on April 21, 2008. On April 14, 2008, appellant filed a motion to continue the trial asserting a lengthy enumeration of purported discovery violations. The motion was apparently argued in an off the record telephone conference prior to trial. The trial court tacitly denied the motion by directing that the trial continue as scheduled. In its third assignment of error, appellant insists that the court's denial of a continuance was erroneous.

{¶ 46} The decision whether to grant a continuance is within the sound discretion of the trial court, and will not be grounds for reversal absent an abuse

of that discretion. *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 9. An abuse of discretion is more than a mistake of law or an error in judgment. The term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 47} The parties argued at length as to whether there were discovery violations, seemingly contesting every detail. Notwithstanding these allegations and counter-allegations, by the time appellant's continuance motion was filed, this case had been on the court's docket for nearly three years. A trial date of April 14, 2008 was first set on September 27, 2007, and rescheduled for April 21 on January 8, 2008. Absent clear and compelling indicia to the contrary, a court acts within its discretion when it adheres to its own scheduling order. Moreover, other than subsequent references to the telephone conference, there is no record, so the regularity of the proceeding must be presumed. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Accordingly, appellant's third assignment of error is not well-taken.

III. Expert Witnesses

{¶ 48} Prior to trial, appellant moved in limine to bar the testimony of appellee's treating physicians, Dr. Antonio DeLara and Dr. R. Michael Kelly. Dr. DeLara should not testify, appellant insisted, in sanction of discovery violations. Dr. Kelly's testimony should not be permitted because he failed to articulate a proper differential diagnosis for appellee and his anticipated testimony that asthma developed into emphysema was speculative.

{¶ 49} A trial court has broad discretion in determining the admissibility of expert testimony. The

determination of the court on such issues will not be disturbed absent an abuse of discretion. *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, ¶ 16.

{¶ 50} With respect to Dr. DeLara, the trial court either found that the discovery violations of which appellant complained were not proven or concluded that any violation did not operate to appellant's prejudice. Appellant has failed to articulate how these decisions constituted an arbitrary, unreasonable or unconscionable attitude by the court. *Blakemore*, supra.

{¶ 51} Concerning Dr. Kelly, any issue of differential diagnosis as a determinant of scientific reliability goes to causation. *Cutlip v. Norfolk Southern Corp.*, 6th Dist. No. L-02-1052, 2003-Ohio-1862, ¶ 45. In the present matter, causation was properly determined on summary judgment and was not at issue in trial.

{¶ 52} Dr. Kelly's testimony regarding the relationship between asthma and emphysema was in response to appellant's assertion during trial that it was emphysema rather that asthma that accounted for appellee's breathing difficulties. Being as this was an issue that appellant inserted into trial, it can hardly claim prejudice if its opposition presents opposing testimony.

{¶ 53} Accordingly, appellant's fourth assignment of error is not well-taken.

IV. Exposure Testimony

{¶ 54} During trial appellant attempted to block testimony from appellee and other railroad workers as to their regular daily exposure to diesel exhaust in the cabs of appellee's locomotives. Since causation had already been established, appellant insisted, testimony as to exposure to exhaust was irrelevant and

its introduction served only to arouse the passion of the jury. The trial court admitted such testimony over appellant's objection.

{¶ 55} Appellee maintains that the exposure testimony went not to causation, but to refute appellant's assertion that his asthma was mild rather than severe as maintained by appellee's treating physicians. Showing the frequency of exposure corroborated his doctors' assessment of his condition, appellee suggests. Moreover, according to appellee, his daily exposure to diesel exhaust was relevant to his request for an award of damages for pain and suffering and mental anguish for the time he was forced to breathe these fumes.

{¶ 56} Evidence which is permissible for one purpose may be admitted, even though there may be a purpose for which such evidence is inadmissible. *Dorsten v. Lawrence* (1969), 20 Ohio App.2d 297, 302; Evid.R. 105. When this occurs, the rule requires a trial court to issue a limiting instruction to the jury if an opposing party requests such an instruction. *Id.* If no such instruction is requested, however, any error is waived. *Lewicky v. Accurate Bldg. Sys.* (Dec. 3, 1998), 8th Dist. No. 72906.

{¶ 57} In this matter, evidence as to appellee's exposure to diesel exhaust was admissible on the issue of the severity of appellee's condition and to establish pain and suffering. Appellant failed to request any limiting instruction. Accordingly, appellant's fifth assignment of error is not well-taken.

V. Jury Instructions

{¶ 58} In its sixth assignment of error, appellant complains that it was prejudiced by the trial court's instruction that workers' compensation did not apply to appellee; that, if the jury could not differentiate between damages resulting from emphysema and those from asthma, appellant was liable for the whole; and that assumption of the risk was not a defense.

{¶ 59} "A charge to the jury should be a plain, distinct and unambiguous statement of the law as applicable to the case made before the jury by the proof adduced." *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12. The trial court is vested with broad discretion in fashioning the language of the charge and its determination as to the propriety of the instructions will not be disturbed absent an abuse of that discretion. *Garbers v. Rachwal*, 6th Dist. No. L-06-1212, 2007-Ohio-4903, ¶ 19.

A. Workers' Compensation

{¶ 60} Prior to deliberation the trial court, in its instructions, advised the jury that appellee brought the suit against appellant, " * * * for injuries and damages he received while in the course of his employment as a locomotive engineer. *Railroad employees are not covered by workers' compensation.* Congress has passed federal legislation requiring railroad employees to bring these actions in Court * * *. [Appellee] has done so." (Emphasis added.)

{¶ 61} Appellant does not contend that this instruction is an inaccurate statement of the law. Rather, it claims that by advising the jury that workers' compensation is unavailable to railroad workers, the court violated a corollary to the collateral source rule and that this violation operated to its prejudice.

Appellant cites to cases in several foreign jurisdictions which, it claims, find introduction of this information reversible error.

{¶ 62} Appellee insists that the instruction belongs in the case because most jurors assume that railroad workers are eligible for workers' compensation and may improperly adjust an award to take such compensation into account. Moreover, appellee maintains, it is local custom in both state and federal courts to include such language.

{¶ 63} In *Eichel v. New York Central R. Co.* (1963), 375 U.S. 253, a railroad worker pursued a FELA claim for injuries sustained on the job. When the worker prevailed at trial, the railroad appealed, arguing that it should have been permitted to introduce as evidence of a motive for not returning to work testimony that the plaintiff was receiving disability payments. The appeals court reversed on this ground and ordered a new trial on damages. (2 C.A.1963), 319 F.2d 12, 14. On further appeal, however, the Supreme Court of the United States reversed the court of appeals, concluding that the likelihood of the misuse of this information by the jury outweighed its probative value and could operate to the plaintiff's prejudice. 375 U.S. at 255.

{¶ 64} A corollary of the *Eichel* ruling forms the basis for the cases upon which appellant relies. In *Weinell v. McKeesport Connecting R. Co.* (3 C.A.1969), 411 F.2d 510, a railroad employee prevailed in a FELA suit after a jury trial. The railroad appealed on a number of grounds, including the trial court's refusal to instruct the jury that FELA was not the only source by which the plaintiff could recover for his injury. This instruction was requested in response to the statement of plaintiff's counsel during opening

that FELA, " * * * provides the only method by which a railroad employee * * * may recover damages * * *." The appeals court reversed the verdict, not on this ground, but because the court had issued to the deliberating jury a "dynamite instruction" that, if they were unable to reach a verdict, it would be an " * * * an encouragement to the Communists * * *." *Id.* at 513. In passing, the court noted that it considered plaintiff's opening comments "improper" and " * * * we assume will not be made again." *Id.* at 512.

{¶ 65} In *Stillman v. Norfolk & Western R. Co.* (4 C.A.1987), 811 F.2d 834, 838, an unsuccessful FELA plaintiff argued that the trial court erred in refusing his proposed instruction that recovery under FELA was his only possible remedy and that he would receive no workers' compensation benefits. The appellate court rejected this argument, finding workers' compensation " * * * completely irrelevant to the issues in the case, and allowing the jury to consider such information could have prejudiced the railroad." Moreover, citing *Eichel*, the court noted that defendants in FELA cases are not allowed to inform a jury that a plaintiff has received benefits from a collateral source. "We perceive no reason for a different rule when the plaintiff in a FELA case seeks to inform the jury of the absence of benefits from a collateral source." *Id.*

{¶ 66} *Stillman* was followed, and perhaps expanded, in *Hileman v. The Pittsburgh and Lake Erie R. Co.* (1996), 546 Pa. 433, 437 ("Railroad employees do not automatically receive worker's [sic] compensation payments * * *" deemed an erroneous charge.); *Kansas City Southern R. Co. v. Stokes* (Texas App., 2000), 20 S.W.3d 45, 48-50 (" * * * not entitled to benefits under Texas Workers Compensation laws, and

the Federal Employers Liability Act is his exclusive remedy * * * " instruction was reversible error.); *Schmitz v. Canadian Pacific R. Co.* (7 C.A.2006), 454 F.3d 678, 685 (Trial court properly refused to answer jury question as to whether plaintiff received workers' compensation benefits.)[.]

{¶ 67} None of the cases appellant cites are binding upon this court. Ultimately, our question is whether instructions containing language reflecting a correct statement of the law is so prejudicial to the railroad that its inclusion constitutes an abuse of discretion. Pursuant to *Eichel*, at 255, this involves an analysis of whether the likelihood that the jury will misuse this information outweighs its value.

{¶ 68} In *Eichel*, the court concluded that the introduction of evidence of the plaintiff's disability pension payments was improper. Such payments could in no way be used in mitigation of other damages and the use of such evidence in support of the proposition that such payments might precipitate malingering was, at best, tenuous. Inclusion of such evidence, then, would result in a potential for misuse by the jury that outweighed the value of the evidence. *Id.*

{¶ 69} This rule, according to appellant, has now morphed into a flat rule that any mention of workers' compensation payments, or the lack thereof, in a FELA case is per se reversible error. We are perplexed at this purported result.

{¶ 70} In *Weinell*, at 512, in dicta and without any analysis or citation to authority, the appeals court disapproves telling the jury that a FELA action is the "only way" a railroad worker may be compensated for an on-the-job injury. *Stillman*, at 838, echoes this

conclusion and, citing *Eichel* for the proposition that a defendant may not inform a jury of collateral benefits, essentially finds that what is good for the goose is good for the gander. *Stillman* also deals with whether a jury may be informed that FELA is the plaintiff's "only possible remedy." *Stokes* is also an exclusive remedy case. *Hileman* and *Schmitz* are pure "no mention" of workers' compensation cases.

{¶ 71} The most persuasive of these cases, in our view, is *Schmitz* because it involves a question from a jury as to whether a FELA plaintiff can collect workers' compensation. This question lends considerable credence to appellee's argument that uninstructed jurors might assume that a FELA plaintiff is entitled to other compensation. It seems to us that, just as a jury informed of collateral disability payments might improperly reduce an award, so too might a jury that mistakenly assumes that a FELA plaintiff will receive collateral workers' compensation benefits be tempted to adjust its award. Given this potential mischief, we cannot say that the trial court acted arbitrarily, unreasonably or unconscionably when it instructed the jury that appellee was not eligible for workers' compensation on this claim.

B. Emphysema

{¶ 72} The court instructed the jury:

{¶ 73} "If you award damages, you shall award Plaintiff such a sum as you believe will fairly and justly compensate him for his asthma. If you find that Plaintiff's pulmonary or lung injuries also involve emphysema, you shall award no sum for the emphysema. If you cannot separate asthma from emphysema with respect to the Plaintiff's pulmonary

and lung damage, the Plaintiff is—the Defendant is liable for all such pulmonary and lung damage."

{¶ 74} Appellant insists that this instruction unfairly holds it responsible for appellee's emphysema even though asthma was the sole basis of liability.

{¶ 75} Appellee responds that it was appellant who brought emphysema into the case, positing it as a cause for some or all of appellee's debility. Since it was appellant who asserts that emphysema, not asthma, caused appellee's diminished health, the burden of proof should be on appellant to demonstrate the degree of emphysema's influence on appellee's health. Moreover, appellee maintains, emphysema should not have been permitted in the case at all, because FELA holds a railroad responsible for an employee's injury irrespective of the degree of the railroad's relative fault.

{¶ 76} "Under the FELA, an employee who suffers an 'injury' caused 'in whole or in part' by a railroad's negligence may recover his or her full damages from the railroad regardless of whether the injury was also caused 'in part' by the actions of a third party." *Norfolk & Western R. Co. v. Ayers* (2003), 538 U.S. 135, 165-166. "FELA allows an injured worker to recover his entire damages from the railroad whose negligence jointly caused an injury, thus placing on the railroad the burden of seeking contribution from other tortfeasors." *Hess v. Norfolk Southern R. Co.*, 153 Ohio App.3d 580, 2003-Ohio-4172, ¶ 55, rev., in part, on other grounds, 106 Ohio St.3d 389.

{¶ 77} This issue must be considered in the specific factual and procedural posture of the case. The jury heard conflicting testimony from experts who testified that emphysema was a progression of asthma and that it was not. The same experts divided on the

question of whether appellee's emphysema was a recent development or had existed coextensively with his asthma for some time. The sole basis of liability had already been determined to have been asthma and, indeed, appellee attempted to limit the damages trial to evidence concerning only asthma.

{¶ 78} We do not believe that in this context *Ayers* and *Hess* are applicable. Those cases dealt with a single injury that may have had been caused by one or more agents in addition to the railroad. Here, there was testimony submitted, if believed, by which the jury could have found that appellee had two distinct conditions. Of these two injuries, it had been determined on summary judgment that appellant was only responsible for one.

{¶ 79} Nevertheless, we conclude that the instruction was proper. It was appellant that advanced the theory that its damages should be mitigated because emphysema rather than asthma was at their root. It seems reasonable that the proponent of such a position should have the burden to demonstrate the degree to which this might be so. See *Minnich v. Ashland Oil Co.* (1984), 15 Ohio St.3d 396, syllabus. This is the effect of the challenged instruction.

C. Assumption of the Risk

{¶ 80} The court charged the jury:

{¶ 81} "You are further instructed that assumption of the risk is no bar to recovery under the Federal Employers' Liability Act or the Locomotive Inspection Act.

{¶ 82} "[Appellant], cannot require [appellee] to assume the risk of injury while working for the railroad, and [appellant] may not argue that it is not

liable or that its liability should not [sic] be reduced because of [appellee's] assumption of the risk."

{¶ 83} Appellant argues that an instruction on assumption of the risk goes to liability, which had already been determined on summary judgment. Appellant suggests that the instruction was irrelevant and operated to its prejudice.

{¶ 84} We agree with appellant that the instruction was surplusage in a damages-only trial, but we fail to see, and appellant fails to articulate, in what manner this charge operated to its prejudice.

{¶ 85} Accordingly, appellant's sixth assignment of error is not well-taken.

VI. Expert Wage Testimony

{¶ 86} In its seventh assignment of error, appellant suggests that the trial court erred in denying its motion for a directed verdict or a J.N.O.V. because appellee failed to present expert testimony on the issue of his lost wages.

{¶ 87} A motion for a directed verdict shall be granted if a trial court, " * * * after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party* * *." Civ.R. 50(A)(4). A motion for a judgment notwithstanding the verdict may be sustained, " * * * only if there was insufficient evidence to permit reasonable minds to reach different conclusions, and conversely, the trial court had a duty to overrule the motion for judgment notwithstanding the verdict if there was sufficient evidence to permit reasonable minds to reach differ-

ent conclusions." *McComis v. Baker* (1973), 40 Ohio App.2d 332, 335, citing *O'Day v. Webb* (1972), 29 Ohio St.2d 215 at paragraph four of the syllabus.

{¶ 88} Appellant insists that a plaintiff's recovery for lost wages must be established with reasonable certainty and may not be permitted when the evidence is subject to speculation and conjecture. Such certainty may only be achieved, according to appellant, by testimony of an expert in such matters. In support of this proposition, appellant cites *Sampson v. Missouri Pacific R. Co.* (Mo.1978), 560 S.W.2d 573, 589.

{¶ 89} Appellee responds that he testified to the wages he had been making, the date he could no longer work for the railroad and the amount of time that he intended to continue working. Appellee insists that all of this testimony was within his knowledge and it was all the jury needed to compute his lost wages. No expert testimony was necessary, and certainly not mandated.

{¶ 90} *Sampson* is not a FELA case. It is a Missouri tort action and, as nearly as we can ascertain, premised wholly on Missouri law. It is not binding precedent for this court, nor do we find it particularly persuasive. Appellant cites no other authority for its assertion that mandatory expert testimony must be offered to prove lost wages.

{¶ 91} Appellee was competent to testify to all of the elements necessary to compute lost wages. Appellant had the opportunity to cross examine appellee and was free to call its own expert if it so chose. Like the trial court, we find no grounds to support a directed verdict or a J.N.O.V. Accordingly, appellant's seventh assignment of error is not well-taken.

VII. Damage Calculations

{¶ 92} In its eighth assignment of error, appellant contends that the jury improperly computed its award because appellee failed to present evidence of either a method to reduce the award to present value or information detailing his state and federal income taxes so as to allow the jury to non-speculatively exclude such items from the award. Appellee responds that nothing in the law mandates that he present testimony on either of these issues.

{¶ 93} An award for wage loss from future earnings under FELA is computed by taking estimated gross wages, less federal and state taxes that would not be incurred because the amount is a tort award rather than earnings. *Norfolk & Western R. Co. v. Liepelt* (1980), 444 U.S. 490, 493. The product of this calculation is then reduced to present value. *St. Louis Southwestern R. Co. v. Dickerson* (1985), 470 U.S. 409, 411-412.

{¶ 94} While it has been held to be error to deny a FELA defendant the right to put on evidence about reducing an award by taxes or adjusting to present value, *Liepelt* at 494; *Monessen Southwestern R. Co. v. Morgan* (1988), 486 U.S. 330, 340, appellant presents us with no compelling authority of a concomitant duty of a FELA plaintiff to come forth with such evidence. Indeed the approved method for dealing with these issues is a jury charge. *Liepelt* at 498; *Monessen* at 342.

{¶ 95} In this matter, the trial court instructed the jury:

{¶ 96} "If your verdict is in favor of the Plaintiff, you will not add any sum of money to the amount of the verdict to account for income taxes * * * because

the amount awarded to the Plaintiff by your verdict is not taxable income to the Plaintiff, and you should not consider income taxes in fixing the amount of your award."

{¶ 97} The court also instructed at length on how to reduce the award to present value and provided the jury with present value tables as a suggested method of computing present value.

{¶ 98} Both of these instructions are in conformity with the charges upheld in the cases. If, as it is presumed to do, *Pang v. Minch* (1990), 53 Ohio St.3d 186, 195, the jury followed the instructions of the court, its award computations were proper. Accordingly, appellant's eighth assignment of error is not well-taken.

VIII. Manifest Weight

{¶ 99} In its final assignment of error, appellant asserts that the verdict was against the manifest weight of the evidence and the award of $2.6 million was "clearly excessive."

{¶ 100} "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. Great deference is given to the jury who, by virtue of its ability to observe the demeanor of the witnesses and test the witnesses' credibility, is presumed to have delivered a correct verdict. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 101} We have carefully examined the transcripts of these proceedings. There was clearly evidence submitted which, if believed, supported all of the

elements necessary to award appellee damages for his injury. As far as the amount of the award, appellant's only argument seems to be that $2.6 million is a lot of money, so obviously the jury lost its way or succumbed to the throes passion.

{¶ 102} Appellee presented evidence tending to show that for more than two decades he had been exposed to diesel exhaust in his workplace, that this exposure caused and then exacerbated his asthma and that his condition would eventually worsen, almost certainly reducing his lifespan. Given this, we cannot say that the jury's award was excessive.

{¶ 103} Accordingly, appellant's ninth assignment of error is not well-taken.

{¶ 104} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist. Loc.App.R. 4.

PETER M. HANDWORK, P.J., and ARLENE SINGER, MARY J. BOYLE, JJ., concur.

Judge MARY J. BOYLE, Eighth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

APPENDIX C

IN THE COURT OF COMMON PLEAS OF
LUCAS COUNTY, OHIO

Case No.: CI 05-5191

FRANCIS BATTAGLIA,
Plaintiff,

vs.

CONRAIL, *et al.*,
Defendants.

Honorable Denise Ann Dartt

OPINION AND JOURNAL ENTRY

I. STATEMENT OF FACTS

Plaintiff Francis Battaglia was hired by Conrail on September 7, 1976, as a trainman/brakeman, was promoted to conductor, and in 1993 became an engineer. On September 9, 2005, Mr. Battaglia filed the instant action against Conrail, Norfolk Southern Corporation, CSX Transportation, Inc., and Conrail Shared Assets. Mr. Battaglia claims that during his tenure with the railroad he has been continuously exposed to diesel exhaust inside his locomotive cabs in which he works and such exposure was the cause of his asthma. The Complaint alleges violations of the Federal Employers' Liability Act (Count One), the Locomotive Inspection Act (Count Two), and 49 C.F.R. Section 229 et seq. (Count Three).

This cause is now before the Court upon Plaintiffs Motion for Partial Summary Judgment as to Count Two only.

II. SUMMARY JUDGMENT STANDARD

The Supreme Court of Ohio has set forth a tripartite test that must be met before a motion for summary judgment can be granted: that there is no genuine issue as to any material fact; that movant is entitled to judgment as a matter of law; and that reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.

A party who claims to be entitled to summary judgment on the grounds that a nonmovant cannot prove its case bears the initial burden of: 1) specifically identifying the basis of its motion, and 2) identifying those portions of the record that demonstrate the absence of a genuine issue of material fact regarding an essential element of the nonmovant's case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The movant satisfies this burden by calling attention to some competent summary judgment evidence, of the type listed in Civ.R. 56(C), affirmatively demonstrating that the nonmovant has no evidence to support his or her claims. *Id.* Once the movant has satisfied this initial burden, the burden shifts to the nonmovant to set forth specific facts, in the manner prescribed by Civ. R. 56(E), indicating that a genuine issue of material fact exists for trial. *Id*; accord *Vahila v. Hall*, 1997-Ohio-421, 77 Ohio St.3d 421.

III. DISCUSSION

Plaintiffs Motion for Summary Judgment and Defendants' Responses raise the following issues:

1) whether Mr. Battaglia was exposed to diesel exhaust during the course of his employment with Conrail; 2) whether such exposure constitutes a violation of the Locomotive Inspection Act; and 3) whether Mr. Battaglia's asthma was caused by his exposure to the diesel exhaust.

A. Plaintiff's Exposure to Diesel Exhaust

Mr. Battaglia testified in his deposition that he has been continuously exposed to diesel exhaust inside the locomotive cabs since the first day he "hired out." He further testified that diesel exhaust entered the locomotive cabs through holes in the floors, cracks in the doors, in the seals, and through the windows and equipment compartment. Mr. Battaglia has frequently reported the unsafe condition of the locomotives to the railroad.

James Kermans, a co-worker of Mr. Battaglia, stated in his affidavit that seals on the doors and windows of locomotive cabs almost always leaked, allowing diesel exhaust fumes to enter the cabs. In addition, Mr. Kermans stated that the locomotives were rarely maintained properly causing toxic diesel exhaust fumes to come into the cab through the firewalls, electrical cabinets, and cracks in the floor.

Defendants contend that Plaintiff must establish that his exposure exceeded the permissible exposure levels (PELs) or time weight averages (TWA) for measurement of diesel exhaust set forth by the Occupational Safety and Health Administration (OSHA) or the American Conference on Governmental Indus-

trial Hygienist (ACGIH). However, Defendants have failed to cite any authority stating that Plaintiff must demonstrate that his exposure exceeded the PELs or TWA. To the contrary, Plaintiff has clearly established through his testimony and that of Mr. Kermans that he was exposed to diesel exhaust inside the cab during the course of his employment.

B. Locomotive Inspection Act

A railroad is absolutely liable under the Locomotive Inspection Act if a locomotive, either in violation of the statute or the regulations promulgated thereunder, causes injury or death. *Lilly v. Grand Trunk Western Railroad Co.* (1943), 317 U.S. 481; *Urie v. Thompson* (1949), 337 U.S. 163, 190. A finding of absolute liability is appropriate where there has been a violation of a safety statute specifically aimed at the railroad industry. *Ries v. National Railroad Passenger Corp.* (1992), 960 F.2d 1156, 1159.

In the instant case, Plaintiff alleges that Defendants violated 49 C.F.R. 229.43(a) which states as follows:

> "Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions."

Defendants argue that 49 C.F.R. 229.43(a) is not clear on its face and, therefore, the Court should give deference to the FRA's interpretation of the regulation. However, the Court finds that the regulation is clear and unambiguous—products of combustion shall be released entirely outside the cab. See, *Norfolk Southern Railway Co. v. Baker* (1999), 237 Ga. App.

292, 514 S.E.2d 448. Since Plaintiff's deposition and his co-worker's affidavit have sufficiently established that diesel exhaust fumes were released into the cab on a regular basis, the Court finds that Defendants have violated 49 C.F.R. 229.43(a).

C. Causation

The railroad is liable if the exposure contributed to any degree, even the slightest, to Plaintiffs asthma. *Aparicio v. Norfolk & Western Railway Co.* (6th Cir. 1996), 84 F.3d 803.

Dr. R. Michael Kelly concluded in his affidavit and report to a reasonable degree of medical certainty that "Mr. Battaglia's ongoing and regular exposure to diesel exhaust, as a result of his work on the railroad, was a significant factor in the development of his asthma."

In response, Defendants rely upon the report of Dr. David Rosenberg which states that Plaintiff's asthma was not related to his employment with the railroad but rather to his past smoking history, esophageal reflux and atopy. However, Dr. Rosenberg's report was not properly authenticated by an affidavit and is thus not acceptable Civ.R. 56(E) evidence and cannot be considered by this Court.

Defendants also rely on reports by Dr. Laura Green which state that there is no scientific literature to support a causal connection between asthma and exposure to diesel exhaust. Dr. Green concluded that "I cannot find compelling or otherwise reliable evidence that on the job exposures at Conrail have harmed Mr. Battaglia's lungs." Again, Dr. Green's reports are unsworn testimony and under Civ.R. 56(E) cannot be considered by this Court.

Therefore, the Court finds that Plaintiff's exposure to the diesel exhaust fumes contributed to his asthma. Accordingly, Plaintiff is entitled to judgment as a matter of law on Count Two of his complaint.

JUDGMENT ENTRY

It is ORDERED that Plaintiff's Motion for Summary Judgment on Count Two is GRANTED.

The trial date of October 9, 2007 is confirmed as to Counts One and Three.

An assessment of damages on Count Two is continued to trial date.

Date: June 15, 2007 /s/ Denise Ann Dartt
Denise Ann Dartt, Judge

APPENDIX D

IN THE COURT OF COMMON PLEAS OF
LUCAS COUNTY, OHIO

Case No.: CI 05-5191

FRANCIS BATTAGLIA,
Plaintiff,

vs.

CONRAIL, *et al.*,
Defendants.

Honorable Denise Ann Dartt

OPINION AND JOURNAL ENTRY

This cause is before the Court upon Plaintiff's Motion for Partial Summary Judgment on Count One and Defendant Conrail's Motion to Reinstate the Unresolved Portions of its Motion for Summary Judgment. After full consideration of the memoranda and evidence submitted and the applicable law, for the reasons that follow this Court finds Plaintiff's Motion well-taken but Defendant's Motion not well-taken, leaving damages as the only issue for trial.

I. Plaintiff's Motion for Partial Summary Judgment.

On June 15, 2007, this Court granted Plaintiff's Motion for Partial Summary Judgment as to Count Two (Locomotive Inspection Act violation), finding that Plaintiff clearly established that he was exposed to diesel exhaust inside the cab, that Defendants

violated 49 C.F.R. 229.43(a) by failing to prevent entry of products of combustion into the cab, and that Dr. Kelly's affidavit established that Plaintiff's ongoing exposure to diesel exhaust was a significant factor in the development of Plaintiff's asthma, concluding that Plaintiff's exposure to the diesel exhaust fumes contributed to Plaintiff's asthma. Defendants' Motion for Reconsideration was denied August 2, 2007.

On August 21, 2007, Plaintiff filed a Motion for Partial Summary Judgment as to Count One (violation of Federal Employers Liability Act) and voluntary dismissal of Count Three (regulatory violation).

For a Federal Employers Liability Act ("FELA") claim, Plaintiff need only show a LIA violation and that the violation caused, at least in part, plaintiff's injury. *Crane v. Cedar Rapids & Iowa City Railway Co.* (1969), 395 U.S. 164, 166; *Fontaine v. National Railroad Passenger Corp.* (1997), 54 Cal. App.4th 1519, 1526. Thus, if the court finds an LIA violation, such violation constitutes negligence per se. *Urie v. Thompson* (1949), 337 U.S. 163, 189; *Paul v. Genesee & Wyoming Industries, Inc.* (W.D. NY 2000), 93 F.Supp.2d 310, 315; *Haworth v. The Burlington Northern and Santa Fe Railway Co.* (E.D. Wash. 2003); 281 F.Supp.2d 1207, 1210-11; *Mickler v. Minishillen & Tuscarawas Ry. Co.* (6th Cir. 1993), 13 F.3d 184, 188; *Waggoner v. Ohio Central Railroad, Inc.* (S.D. Ohio 2007), Case No. 2:06-CV-250, 2007 U.S. Dist. Lexis 87197, at pgs. 8, 11. Where there is a violation of the LIA, the railroad is liable and the court need not consider the negligence claim under FELA. *Hinkle v. Norfolk Southern Railway Co.* (S.D. Ohio 2006), 2006 U.S. Dist. Lexis 92515, at *22; *Kobe*

v. Canadian National Railway Co. (D. Minn. 2007), Civ. No. 06-3439, 2007 WL 2746640, at *7.

On June 15, 2007, this Court found that Defendants violated the LIA by failing to prevent the entry of diesel fuel into the cab and that this exposure to diesel fuel contributed to Plaintiff's asthma. Therefore, Plaintiff has demonstrated that Defendants were negligent and that such negligence proximately caused Plaintiff's injury.

Once the court finds that a defendant has violated a safety statute and such violation caused, at least in part, Plaintiff's injury, evidence of contributory negligence and evidence of other possible causes is eliminated for *any* purpose. *Carter v. Atlanta & St. Andrews Bay Railway Co.*, 338 U.S. 430, 436-37 (1949); *Eckert v. Aliquippa & Southern R.R. Co.* (3rd Cir. 1987), 828 F.2d 183, 186; *Haworth*, supra at 1214; *Pratico v. Portland Terminal Co.* (1st Cir. 1985), 783 F.2d 255, 260; *Neal v. Saga Shipping Co.* (5th Cir. 1969), 407 F.2d 481, 485-86.

Defendants cite to 45 U.S.C. Section 53 which states that damages shall be diminished in proportion to the amount of negligence attributable to the employee, but Defendants ignore the exception at the end:

> "Provided, That no such employee who may be injured . . . shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury . . . of such employee."

Since this Court has already determined that Defendants violated the LIA and such violation contributed to Plaintiff's injury, the above exception applies and

the Court is prohibited from considering any evidence regarding Plaintiff's contributory negligence or other possible causes for his injury.

The Court therefore finds that no genuine issues of material fact exist and Plaintiff is entitled to judgment as a matter of law as to Count One.

II. Defendant Conrail's Motion to Reinstate the Unresolved Portions of Its Motion for Summary Judgment.

On September 7, 2007, Defendants filed a Motion for Summary Judgment arguing that only Conrail was Plaintiff's employer and that Plaintiff failed to produce a liability expert report establishing that Defendants' alleged negligence was the cause of his alleged asbestos related injuries. On January 25, 2008, Defendants withdrew their Motion.

Defendant Conrail filed a Motion to Reinstate the Unresolved Portions of its Motion for Summary Judgment on February 29, 2008. Defendant claims that the portion of its Motion dealing with Plaintiff's failure to produce a liability expert regarding asbestosis is still an issue. However, Plaintiff's complaint does not even contain any cause of action related to asbestos or asbestos-related injuries—Plaintiff is alleging injury as a result of exposure to diesel exhaust, not asbestos. Furthermore, the Motion to Reinstate is untimely as Motions for Summary Judgment were to be filed by September 7, 2007.

Accordingly, Defendant's Motion to Reinstate is not well-taken.

JOURNAL ENTRY

It is ORDERED that Defendant's Motion to Reinstate the Unresolved Portions of its Motion for

Summary Judgment is DENIED.

It is further ORDERED that Plaintiff's Motion for Partial Summary Judgment as to Count One is GRANTED, leaving damages as the only issue for trial.

Date: April 8, 2008 /s/ Denise Ann Dartt
Denise Ann Dartt, Judge

APPENDIX E

THE SUPREME COURT OF OHIO

[April 14, 2010]

Case No. 2009-2148

FRANCIS BATTAGLIA

v.

CONRAIL *et al.*

RECONSIDERATION ENTRY
Lucas County

It is ordered by the Court that the motion for reconsideration in this case is denied.

(Lucas County Court of Appeals; No. L081332)

/s/ PAUL E. PFEIFER
PAUL E. PFEIFER
Acting Chief Justice

APPENDIX F

FEDERAL STATUTES

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

49 U.S.C. § 20701. Requirements for use

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

APPENDIX G

FEDERAL REGULATION

49 C.F.R. § 229.43. Exhaust and Battery Gases

(a) Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions.

(b) Battery containers shall be vented and batteries kept from gassing excessively.

APPENDIX H

U.S. Department of Transportation

Federal Railroad Administration
Office of Safety Assurance and Compliance

LOCOMOTIVE CRASHWORTHINESS AND CAB WORKING CONDITIONS

REPORT TO CONGRESS

September 1996

CHAPTER 7

Locomotive Cab Air Quality

Poor cab air quality can be caused by the entry of diesel exhaust gases into the cab. The causes are exhaust system leaks and vented gas entering through the cab windows and other apertures. Concerns often arise when the locomotive is idling or moving through enclosed spaces such as tunnels or deep cuts. Exposure may be greatest for employees while occupying cabs of trailing (non-lead) locomotives.

The diesel engine emissions of primary concern are carbon monoxide (CO), oxides of nitrogen (as NO_2), and hydrocarbon (HC) vapors and particulates. Tests under "worst case" conditions indicate that personnel in the cabs of trailing locomotives may occasionally be exposed to concentration levels of oxides of nitrogen air contaminants in excess of recognized occupational exposure limits. Continued vigilance is needed to prevent exposure to harmful exhaust emissions.

The potential entry of diesel exhaust gases into spaces occupied by the crew is a primary concern with respect to locomotive air quality. Two modes of entry exist. First, exhaust system leaks may allow exhaust to enter the cab prior to being vented up the stack. Current FRA regulations cover locomotive exhaust system leaks of this type. Second, a possibility exists that properly vented exhaust gases may enter the cab. Stacks are generally high enough, or located aft to the direction of travel of the cab, so that entry of properly vented exhaust gases into cabs of lead locomotives moving outside of enclosed spaces—such as tunnels—is not a problem. The highest potential for cab contamination by properly vented exhaust gases exists with idling locomotives, locomo-

tives moving through enclosed spaces such as tunnels or deep cuts, and occupied cabs of trailing locomotives. This chapter addresses the findings of a study conducted by FRA in an effort to identify and quantify problems such as these. This study consisted of a review of existing regulations, a study of the effects of air quality on human performance, a review of injury/illness data due to fumes reported to FRA between 1990 and 1994, and air quality testing in the Cascade Tunnel.

Review of Existing Federal Regulations and Standards

FRA reviewed the existing Federal regulations and standards covering workplace and vehicle air quality. The existing FRA regulation covering locomotive cab air quality is contained in 49 CFR 229.43(a) and (b) as follows:

> *Exhaust and Battery Gases*
>
> *(a) Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions.*
>
> *(b) Battery containers shall be vented and batteries kept from gassing excessively.*

FRA does not specify limits for the concentration of the products of diesel fuel combustion, and does not require air exchange rates for locomotive cabs. However, the Occupational Safety and Health Administration (OSHA) does specify workplace concentration Limits in 29 CFR §1910.1000 (Air Contaminants) for

the common products of diesel fuel combustion listed in Table 7-1:

OSHA Limits for Air Contaminants

GAS	MAXIMUM 8-HOUR TIME WEIGHTED AVERAGE (TWA) EXPOSURE CONCENTRATION
Nitric Oxide (NO)	25 parts per million (ppm)
Nitrogen Dioxide (NO_2)	5 ppm—at no time shall exposure exceed
Sulfur Dioxide (SO_2)	5 ppm
Carbon Monoxide (CO)	50 ppm
Carbon Dioxide (CO_2)	5000 ppm

Table 7-1

FRA employs the OHSA criteria to determine compliance with the Locomotive Inspection Act[1]:

> §20701. Requirements for use
>
> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances:
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
>
> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

[1] Public Law 103-272, July 5, 1994.

(3) can withstand every test prescribed by the Secretary under this chapter.

The U.S. Military specifies the following air quality standards for crew spaces of military vehicles in MIL-STD-1472, Human Engineering Design Criteria for Military Systems, Equipment, and Facilities:

- Outside fresh air shall be supplied at minimum rate of 20 ft^3 per minute per person. Air flow rates for hot-climate operation temperatures above 90° F shall be maintained between 150 ft^3 and 200 ft^3 per minute per person, unless air conditioning is provided. Air velocity at each person's head location shall be adjustable either continuously or with not less than three ratings (off, low, and high) from near zero to at least 400 feet per minute.
- Air shall be moved past personnel at a velocity not more than 200 feet per minute. When manuals or loose papers are used, airspeed past these items shall not be more than 100 feet per minute, if possible, to preclude pages in manuals from being turned by the air or papers from being blown off of work surfaces.
- Ventilation or other protective measures shall be provided to keep gases, vapors, dust, and fumes within the Permissible Exposure Limits specified by 29 CFR §1910 and the limits specified in the American Conference of Governmental Industrial Hygienists (ACGIH) Threshold Limit Values (TLV). Intakes for ventilation systems shall be located to minimize the introduction of contaminated air from such sources as exhaust pipes.

FRA also investigated how FAA regulates aircraft cabin air quality. Discussions with FAA human factors engineering staff responsible for aircraft heating, ventilation and air conditioning (HVAC) revealed that FAA has only very general HVAC requirements because the commercial sector is very competitive in this area, and is therefore market-driven. Current aircraft designs greatly outperform the only two criteria specified by FAA, listed as follows:

- Each crew compartment must be ventilated, and each crew compartment must have enough fresh air (but not less than 10 cubic feet per minute per crew member) to enable crew members to perform their duties without undue discomfort or fatigue.
- Crew compartment air must be free from harmful or hazardous concentrations of gases or vapors. In meeting this requirement, the following apply:
  - Carbon monoxide concentrations in excess of one part in 20,000 parts (or 50 ppm) of air are considered hazardous.
  - Carbon dioxide in excess of three percent by volume (sea level equivalent) is considered hazardous in the case of crew members. Higher concentrations of carbon dioxide may be allowed in crew compartments if appropriate protective breathing equipment is available.

* * *

Cab Air Quality Measurement Conclusions

Data submitted to FRA by railroads shows approximately 50 railroad employees per year become ill due

to exposure to poor air quality in locomotive cabs, resulting in approximately 1000 days per year of lost time. This is a problem that railroads should not ignore. However, several sets or gas sampling measurements taken over the past 25 years have failed to confirm a widespread problem with cab air quality, even under conditions tested to closely simulate a worst case scenario.

FRA concludes that personnel in the cabs of trailing locomotives may be occasionally exposed to concentration levels of oxides of nitrogen air contaminants in excess of recognized occupational exposure limits, under certain adverse train operating conditions such as passing through long tunnels. Due to the high levels of gases found in the trailing cab of trains passing through regions of restricted air exchange such as long tunnels, railroads should monitor cab air quality and take appropriate responsive action. For instance, a railroad could either:

- provide a means for providing suitable air quality for the crew riding in the trailing locomotive, with means such as positive air pressure in the cab to inhibit the entry of air contaminants; or
- not permit the crew to ride in the trailing locomotive while passing through tunnels or similar environments.

The new locomotives may provide a better air quality environment for the crew. As the older locomotives are replaced with newer units, the trend of air quality is improving.

FRA recommends that railroads conduct a study of their operations to determine sites and types of operations that pose a high risk for unacceptable cab

air quality. Railroads should take operational steps to prevent exposure of personnel to high levels of diesel exhaust gases in trailing locomotive cabs at each site or during each type of operation identified.

FRA will continue to enforce requirements of FRA regulations that require exhaust gases to be properly vented. FRA will also continue to apply OSHA criteria as reference standards to determine compliance with the Locomotive Inspection Act, as codified. FRA does not intend to pursue further rulemakings that addresses cab air quality at this time. However, FRA will continue to monitor the number of reported illnesses due to cab air quality. If industry efforts do not result in a decrease in the number of incidents attributable to poor air quality, further actions will be taken.

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(3)

No. 10-75

Supreme Court, U.S.
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In The

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

FRANCIS BATTAGLIA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Ohio, Sixth Appellate District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court erred in granting summary judgment on liability where the only admissible evidence on causation showed that exhaust fumes from Conrail's locomotive resulted in Mr. Battaglia's adult-onset-asthma.

2. Whether this Court should grant the petition for certiorari to consider whether the Ohio Court of Appeals properly read the plain meaning of the applicable diesel exhaust regulation.

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STATEMENT OF THE CASE

Francis Battaglia retired from his long career as a brakeman, conductor, and locomotive engineer for Consolidated Rail Corporation (Conrail) in 2007, after he was diagnosed with adult-onset-asthma and advised by his doctor to avoid further exposure to diesel exhaust.[1] Mr. Battaglia brought an action in the Lucas County (Ohio) Court of Common Pleas against Conrail for his adult-onset-asthma under the Federal Employers' Liability Act, 45 U.S.C. § 51 (FELA), and the Federal Locomotive Inspection Act, 49 U.S.C. § 20701 (FLIA).

Mr. Battaglia sought summary judgment on his FLIA and FELA claims, relying on **sworn** deposition and affidavit testimony establishing that Conrail's defective locomotives exposed him to diesel exhaust from virtually the first day he began working for Conrail and that the daily exposure ultimately resulted in adult-onset-asthma. For example, his own testimony described the "blue smoke" and "black diesel oil" entering the locomotive cabs before ever entering the exhaust stacks, through holes in the floor, cracks in the doors, the windows, and the electrical compartment of virtually the entire fleet. Pet. App. 30a; Pl.'s Summary Judgment Mtn, Count II, Exhibit A at 73. Another witness, a fellow engineer,

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[1] Conrail's states that Mr. Battaglia was a smoker for 13 years (Pet 8), but neglects to mention that he stopped smoking some 31 years before contracting adult-onset-asthma Pet App. 8a ¶ 30.

testified that "the locomotives which we were required to operate were rarely maintained properly causing toxic diesel exhaust fumes to come in the cab through the firewalls; electrical cabinets; and even cracks in the floor," and that seals on the doors and windows of locomotive cabs almost always leaked, allowing diesel exhaust to enter the cabs. Pet. App. 30a.

In addition to diesel exhaust coming through the walls and floor, the evidence showed that some diesel exhaust would enter the locomotive cab because the exhaust stacks were not of "sufficient height . . . to prevent entry of products of combustion into the cab . . . " 49 C.F.R. § 229.43. Much of the diesel exhaust never even made it to the locomotive stacks.[2] As the Ohio Court of Appeals observed: "Appellant [Conrail] has never suggested that the conditions experienced by appellee [Battaglia] were in any way the result of unusual operating conditions, nor has it presented evidence contradicting [Mr. Battaglia's] assertion of exposure." Pet. App. 11a ¶ 39.

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[2] Other railroaders testified at trial that, over the course of their railroad careers, they had operated locomotives from virtually every major carrier as they would come into the Detroit yards and that Conrail's locomotive fleet was in inferior condition, specifically stating that Conrail's locomotives in the Detroit, Michigan area rail yards where Mr. Battaglia spent the majority of his career were in "terrible condition," thus exposing them and other railroad workers daily to toxic diesel exhaust fumes. Tr. of 4/23/2009 Hearing at 7-8.

On the issue of causation, Mr. Battaglia proffered the **sworn** expert testimony of his physician, Michael Kelly, M.D., who is board-certified in Internal Medicine, as well as in Occupational Medicine. Dr. Kelly stated that, in his opinion, to a reasonable degree of medical certainty, Mr. Battaglia's "ongoing and regular exposure to diesel exhaust, as a result of his work on the railroad, was a significant factor in the development of his asthma." Pet. App. 32a. In violation of Ohio Civil Rule 56, to rebut Mr. Battaglia's medical expert, Conrail submitted only **unsworn** medical reports. Even after Mr. Battaglia's counsel brought this error to Conrail's attention, Conrail did not submit sworn affidavits, as required by Ohio Civil Rule 56(e). The only proper medical evidence before the trial court was that of Mr. Battaglia's physician, who determined that diesel exposure was a "significant factor" in causing Mr. Battaglia's adult-onset-asthma. Pet. App. 32a.

Accordingly, the trial court entered summary judgment for Mr. Battaglia, concluding that prolonged exposure to diesel exhaust fumes in the cab of Conrail's locomotives established Conrail's violation of the FLIA, as well as of 49 C.F.R. § 229.43, which in turn constituted negligence *per se* under the FELA. Pet. App. 36a-37a. The court also found that the unrebutted evidence showed that this exposure

contributed to Mr. Battaglia's adult-onset-asthma.[3] Pet. App. 32a-33a.

Conrail filed a motion for reconsideration, arguing that the sworn testimony proffered by Mr. Battaglia was not sufficient to establish that Mr. Battaglia came into contact with an amount of diesel exhaust "that could be quantified" as an "exposure" for purposes of 49 C.F.R. § 229.43, even though the plain language of the regulation does not contain any exposure or other quantitative threshold. Conrail also argued that the court should have considered Conrail's unauthenticated medical expert reports. The court denied Conrail's motion for reconsideration. The case proceeded to a jury trial on Mr. Battaglia's damages. At the conclusion of trial, the jury returned a verdict of $2.6 million.

Conrail did not challenge the causation standard applicable in FLIA or FELA cases in its motion for reconsideration or in any of its post-trial motions. Similarly, Conrail's appeal to the Ohio Sixth District Court of Appeals focused on whether the trial court erroneously refused to consider unsworn medical testimony in opposition to Mr. Battaglia's summary judgment motion. As the Ohio appellate court found, the trial court properly excluded Conrail's documents from consideration because "[d]ocuments submitted in opposition to a motion for summary judgment

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[3] The FELA standard of causation applies to FLIA claims. *See, e.g., Lilly v. Grand Trunk W R Co.*, 317 U.S. 481 (1945).

which are not sworn, certified, or authenticated by affidavit have no evidentiary value [as set forth in Ohio Civil Rule 56(e)] and may not be considered by the court in deciding whether a genuine issue of material fact remains for trial." Pet. App. 11a ¶ 42. The appellate court also noted that, "since [Conrail] was given notice of the insufficiency of its proofs prior to its last response to the summary judgment motion and failed to remedy the deficiency, the trial court acted well within its discretion in denying it yet another bite of that apple" Pet. App. 12a ¶ 43.

Although this court issued *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158 (2007), well before the trial court decided the summary judgment motions, Conrail did not cite the case until its memorandum seeking discretionary review in the Supreme Court of Ohio (the Ohio equivalent to a petition for a writ of certiorari).[4] Thus, the Ohio courts had no real opportunity (let alone any reason, because this case

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[4] After issuing the first summary judgment, the parties submitted briefings on the issue of causation in the context of contributory negligence, because Conrail was seeking permission to re-open discovery and further question Mr. Battaglia's treating and expert physicians. Conrail mentioned *Sorrell* in its supplemental briefing, but the trial court did not address the issue because, again, the linchpin was the lack of rebuttal evidence presented at the summary judgment stage and Conrail's failure to follow the Ohio civil rules. In this regard, shortly after the parties submitted the briefings, the trial court entered an order specifically stating that the court's summary judgments "eliminat[ed] the issue of causation." Trial Court Order Apr. 10, 2008.

was decided based on unrebutted causation evidence) to consider Conrail's new challenge to the prevailing interpretation of FELA causation.

REASONS FOR DENYING WRIT

I. THIS CASE PRESENTS AN INADEQUATE VEHICLE TO ADDRESS ANY OSTENSIBLE CONFLICT ABOUT INTERPRETATION OF THE CAUSATION STANDARD IN FELA CASES.

Conrail asks this Court to grant certiorari to resolve an ostensible conflict among state and federal courts regarding the standard for proving causation in a FELA negligence action. Specifically, Conrail contends that a handful of state supreme courts insist that a FELA plaintiff prove traditional, common-law proximate causation, Pet. 18, 24-28, while federal courts of appeals, citing *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500 (1957), require a plaintiff to prove only that the defendant's negligence was the "slightest" cause of the plaintiff's injury. Pet. 18-22, 26-28. Conrail has exaggerated a supposed conflict, and, in any event, this case presents an inadequate vehicle to address it, as set forth below.

A. Based on the evidence, the trial court's summary judgment withstands any interpretation or standard of causation proposed by Conrail.

This case is not about fine-point distinctions between "in whole or in part" and "any part, even the slightest," or even so-called "proximate cause." As set forth above, Mr. Battaglia moved for summary judgment, and as part of his motion, he presented Dr. Keily's **sworn** affidavit stating his opinion to a "reasonable degree of medical certainty" that Mr. Battaglia's ongoing and regular exposure to diesel exhaust as a result of working on Conrail's locomotives was a "significant factor" in his development of adult-onset-asthma. In response to Mr. Battaglia's motion, Conrail disregarded Ohio Civil Rule 56(e), which required Conrail to respond with equally sworn medical testimony to survive summary judgment, and submitted **unsworn** medical testimony. Although advised that it was not in compliance with the Ohio rule, Conrail declined the opportunity to correct its mistake.

Summary judgment is not a dry run; it is the "put up or shut up" moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events. *Cox v. Ky. Dept. of Transp.*, 53 F.3d 146, 149 (6th Cir. 1995) (internal citations omitted). If the moving party satisfies its burden (there is no dispute that Mr. Battaglia satisfied such burden), then the burden of going forward shifts to the nonmoving

party to produce evidence that results in a conflict of material fact. Here, to defeat summary judgment, Conrail could not rest on mere allegations or denials, but needed to set forth specific facts showing that there was a genuine issue for trial. Ohio Civ. R. 56(e). In this regard, documentary evidence presented on summary judgment must be properly authenticated; any report or affidavit presented at the summary judgment stage must be **sworn**. *See, e.g., Citizens Ins. Co. v. Burkes*, 381 N.E.2d 963, 967-68 (Ohio App. Ct. 1978); *Green v. B.F. Goodrich Co.*, 619 N.E.2d 497, 500 (Ohio App. Ct. 1933). If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Here, there were no disputed or rebutted facts – the only admissible evidence before the trial court was Dr. Kelly's testimony that, to a reasonable degree of medical certainty, the diesel exhaust was a "significant factor"[5] in Mr. Battaglia's contracting

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[5] Conrail cites to an Ohio case, *Rhodes v Firestone Tire & Rubber Co*, No 08AP-314, 2008 WL 4368480, at *3-4 (Ohio Ct. App. Sept 25, 2008), for the proposition that an expert's statement that an alleged defect was a "significant factor" in causing a plaintiff's injury has been held to be inadequate to satisfy the requirement of traditional proximate causation. Pet. 24, n.11 In *Rhodes*, however, the court based its ruling on the fact that the expert specifically declined to conclude "to a reasonable degree of engineering probability" that the defect was a probable cause

(Continued on following page)

adult-onset-asthma. No admissible evidence before the court suggested any other causes. And none of the cases on which Conrail relies holds that evidence establishing that a railroad's negligence was a "significant factor" in causing injury is insufficient to establish the necessary degree of causation under the FELA.

Any difference between "even the slightest" causation and so-called "proximate cause" was never litigated in the trial court, nor made an issue of record at trial. In this regard, although "proximate cause" is not a concept susceptible of precise definition,[6] the great majority of courts hold that a negligent act is the proximate cause of an injury when the injury is a natural and probable consequence, which in light of the circumstances, should have been

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of the injury. In contrast, here, the expert testimony was that to a reasonable degree of medical certainty the exposure was a "significant factor" in Mr Battaglia's contracting adult-onset-asthma

[6] W Page Keeton, *et al*, *Prosser and Keeton on Torts* § 41, at 263 (5th ed 1984) (regarding the law of proximate cause, "[t]here is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion"); *accord, e g., Blue Shield of Va v. McCready*, 457 U S. 465, 478 n 13 (1982) (discussing elusiveness of test of proximate cause); *Palsgraf v. Long Island R.R. Co.*, 162 N E 99, 103 (N.Y. 1928) (Andrews, J , dissenting) ("What is a cause in a legal sense, still more what is a proximate cause, depends in each case upon many considerations. . What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.")

foreseen or anticipated. *See, e.g.*, 57A Am. Jur. 2d *Negligence* § 485; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 705 (2004).[7] Conrail never claimed that Dr. Kelly's sworn testimony, which was expressed to a reasonable medical certainty, did not satisfy this standard. And, as set forth above, no rebuttal evidence was offered showing that some other cause would have produced the injury independently of Mr. Battaglia's pervasive and prolonged exposure to diesel exhaust while working on Conrail locomotives, or that adult-onset-asthma or other injury was somehow not foreseeable as a result of such exposure.

The only proper evidence before the trial court was Dr. Kelly's sworn testimony stating to a reasonable degree of medical certainty that the exposure was a "significant factor" in Mr. Battaglia's contracting adult-onset-asthma. Pet. App. 32a. A "significant factor" is far more than the "slightest" or even a cause "in part" (which is the precise language of the FELA); even under the so-called proximate cause standard now proposed by Conrail, the outcome would have clearly been the same here. The evidence of toxic diesel exposure was astounding. Mr. Battaglia described in sworn testimony the exposure that he experienced from day one not as casual exhaust, but

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[7] And, a given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm. *Accord, e.g.*, W. Page Keeton, *et al.*, *Prosser and Keeton on Torts* § 41, at 266-68 (5th ed. 1984) (an injury may have more than one proximate cause).

as "blue smoke" and "black diesel oil" entering Conrail locomotive cabs through holes in the floors, cracks in the doors, in the seals, through the windows, and through the electrical compartment of virtually the entire fleet. Pet. App. 30a. Additionally, a fellow engineer averred in a sworn affidavit that "the locomotives which we were required to operate were rarely maintained properly causing toxic diesel exhaust fumes to come into the cab through the firewalls; electrical cabinets; and even cracks in the floor." Pet. App. 30a.

Even assuming interpretation of the causation standard were otherwise worthy of certiorari, the Court should await a case where the existence of proximate causation actually was disputed at summary judgment – that is, where the railroad actually presented competent rebuttal evidence – or at trial, and where the outcome of such dispute actually or potentially affects the outcome of the case.

B. Conrail did not press its challenge to *Rogers* and its progeny.

This Court has a long-standing prudential policy against granting certiorari to review issues that were not the basis for the decision below. This Court has said time and time again that it "ordinarily 'do[es] not decide in the first instance issues not decided below.'" *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (quoting *NCAA v. Smith*, 525 U.S. 459, 470 (1990)). This Court has deemed it "unseemly" to

disturb the finality of state judgments on a ground that the state trial court did not have occasion to consider. *See, e.g., Adams v. Robertson*, 520 U.S. 83, 90 (1997); *Webb v. Webb*, 451 U.S. 493, 500 (1981).[8]

This case falls squarely within these precedents. Given the lack of rebuttal evidence, the Ohio appellate court had no reason to consider Conrail's current argument that FELA requires proof of a type of proximate cause to establish a railroad's negligence. Although Mr. Battaglia quoted the "in the slightest" standard in his summary judgment pleadings, neither Conrail's opposition brief, nor even Conrail's reconsideration brief, disputed its application or even mentioned proximate cause. Instead, Conrail's argument focused on the trial court's decision to disregard unsworn medical testimony. **Nor** did Conrail raise the issue in its post-trial motions or in its initial brief to the state appellate court, from which it now seeks certiorari.

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[8] And, this Court has held that reviewing a state-court judgment that rests on adequate and independent state grounds is not appropriate, where, as here, the state ground is the petitioner's failure to comply with state procedural rules (here, the rule precluding reliance on unauthenticated documents at the summary judgment stage under Ohio Civil Rule 56). *See, e.g., Wolfe v. N.C.*, 364 U.S. 177, 196 (1960); *see also Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); *Penn. R. Co. v. Ill. Brick Co.*, 297 U.S. 447, 463 (1936). The reason is simple: "if the same judgment would be rendered by the state court after [this Court] corrected its view of federal laws, [this Court's] review could amount to nothing more than an advisory opinion." *Herb*, 324 U.S. at 126.

On appeal of the jury verdict, Conrail did not challenge the causation standard until its reply brief, and even then, it did not mention Justice Souter's concurrence in *Sorrell* (the focal point of its petition for certiorari). Rather, in the Ohio appellate court, Conrail focused on the state-law issues involving exclusion of the unsworn affidavits.[9] The appellate court concluded that the trial court properly excluded the unsworn testimony from consideration of the summary judgment, especially "since [Conrail] was given notice of the insufficiency of its proofs prior to its last response to the summary judgment motion and failed to remedy the deficiency." Pet. App. 12a ¶ 43.

Conrail failed to press its current claim until it sought review by the Ohio Supreme Court – and for good reason, because the issue is without moment here. As explained above, the deciding factor on causation in this case was the lack of rebuttal evidence on

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[9] Ohio Rule of Appellate Procedure 16(A)(3) requires appellants to submit a statement of the assignments of error for review. Of the nine assignments of error asserted by Conrail to the Ohio appellate court, not one challenges the standard of causation. Rather, Conrail's challenge to the trial court's summary judgment was that there was a "question of material fact" based on the "unsworn contradictory opinions of its medical experts." Pet App. 11a ¶ 41. The appellate court addressed the procedural issue and found that the trial court properly excluded Conrail's unsworn documents from consideration. Pet. App. 11a-12a ¶¶ 42-43. The appellate court did not (and had no reason to) address the issue now raised by Conrail about the interpretation or standard of causation.

summary judgment resulting from Conrail's failure to comply with Ohio Civil Rule 56(e).

II. THERE IS NO DEEP OR PERSISTENT CONFLICT ABOUT *ROGERS'* INTERPRETATION OF THE FELA.

A. Every federal court of appeals addressing the issue has followed *Rogers*.

Conrail claims a "deep and persistent" conflict over the interpretation of the FELA causation standard. Conrail argues that while some courts insist on proof of "proximate cause," others hold that FELA abrogates the common-law requirement of proximate causation. Pet. 18. This is a false dichotomy.

The federal courts of appeals **all**, without exception, read *Rogers* as making, in effect, the same broad statement that this Court made in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994); that is, "a relaxed standard of causation applies under the FELA"[10] or as modifying common-law proximate

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[10] *Moody v. Me. Cent. R.R. Co.*, 823 F.2d 693, 695 (1st Cir. 1987) ("We recognize the considerably relaxed standard of proof in FELA cases"), *Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999) ("a relaxed standard applies in FELA cases"); *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267 (3rd Cir. 1991) ("In *Rogers*, the Court held that 'the test of a [FELA] jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury.'"); *Brown v. Balt. & Ohio R.R. Co.*, 805 F.2d 1133, 1137 (4th Cir. 1986) (quoting *Rogers* as authority, for this most "lenient standard of proof" with respect to causation

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cause. *See, e.g., Nivens v. St. Louis Sw. Ry. Co.*, 425 F.2d 114, 118 (5th Cir. 1970) (quoting *Rogers* and holding that "the common-law proximate cause standard is modified, and the employee has a less demanding burden of proving causal relationship"); *Nicholson v. Erie R.R. Co.*, 253 F.2d 939, 940 (2d Cir. 1958) (quoting *Rogers* and stating that "[i]t is true that, to impose liability on the defendant, the negligence need not be the proximate cause of the injury"

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in an FELA action), *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (unanimous, *en banc*) ("Supreme Court used the term 'slightest' [in *Rogers*] to describe the reduced standard of causation between the employer's negligence and the employee's injury in FELA [] cases"); *Richards v. Consol. Rail Corp.*, 330 F.3d 428, 434 (6th Cir. 2003) ("The *Rogers* Court adopted this relaxed [causation] standard"); *Harbin v. Burlington N. R.R. Co.*, 921 F.2d 129, 131 (7th Cir. 1990) ("It is well established that the quantum of evidence required to establish liability in an FELA case is much less than in an ordinary negligence action"); *Nordgren v. Burlington N. R.R. Co.*, 101 F.3d 1246 (8th Cir. 1996) (relaxed standard for causation); *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358, 1363 (9th Cir. 1995) ("[t]he standard for receiving a jury trial is less stringent in FELA cases than in common law tort cases"); *Summers v. Mo. Pac. R.R. System*, 132 F.3d 599, 606 (10th Cir. 1997) (quoting *Rogers* at length); *Thibodeaux v. Tex. E. Transmission Corp.*, 548 F.2d 581, 587 n.12 (5th Cir. 1977) (pre-split, and thus binding in the 11th Cir.) ("Under the Jones Act, 46 U.S.C. § 688, the test for liability is whether 'employer negligence played any part, even the slightest, in producing the injury' ") (quoting *Rogers*); *Brooks v. Wash. Terminal Co.*, 593 F.2d 1285, 1288 (D.C. Cir. 1979) ("The test whether an F.E.L.A. case should be submitted to the jury 'is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' ") (quoting *Rogers*)

because the FELA "has its own rule of causation"). And Conrail fails to identify a single post-*Rogers* decision from this Court even intimating that *Rogers* was incorrectly decided.

B. *Rogers* is consistent with the FELA decisions that came before it.

Conrail also seeks to evade *Rogers* by portraying this Court's pre-*Rogers* FELA jurisprudence as applying traditional notions of proximate causation. The fact that pre-*Rogers* decisions use the term "proximate cause" in FELA cases provides no insight into the meaning of that term, because not until *Rogers* was this Court given the opportunity to address the appropriate causation standard for railroad negligence. In all of the earlier decisions, the Court's use of that term was not essential to its decision. Moreover, when the Court referenced proximate cause in its *pre-Rogers* decisions, it did not give the term the meaning that Conrail attributes to it.

For example, *Rogers* cites *Coray v. Southern Pacific Co.*, 335 U.S. 520 (1949), which suggested an FELA plaintiff must show that the railroad's negligence was the proximate cause of his injuries, for the proposition that railroad negligence need only have "played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 523; *Rogers*, 352 U.S. at 506 & n.11. In *Coray*, this Court reversed a judgment in favor of a railroad, despite the tenuous causal connection between the

railroad's negligence and the employee's injury, a connection that the state supreme court described as merely philosophical and not substantial. *Coray*, 335 U.S. at 523. This Court explained that the FELA "declares that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from" the railroads' negligence, and therefore it "has commanded that if a breach of [its duty of care] contributes in part to an employee's death, the railroad must pay damages." *Id.* at 524. This Court cited *Coray* in *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434-35 (1949), for the proposition that an FELA plaintiff may prevail by presenting evidence that the railroad's negligence was a "contributory proximate cause."[11] *Id.* Likewise, in *Schulz v. Penn. R.R. Co.*, 350 U.S. 523, 526 (1956), a Jones Act case,[12] this Court reversed a directed verdict in favor of the employer, noting that "[f]act finding does not require mathematical certainty" and liability may be imposed if the injury or death "resulted 'in whole or in part' from [the employer's] negligence." *Id.*

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[11] This, of course, directly contradicts Conrail's suggestion that railroad negligence must be "the" proximate cause, as opposed to "a" proximate cause. *Coray* and *Carter* are irreconcilable with Conrail's theory that common law principles govern FELA causation

[12] Cases brought under the Jones Act, the federal law governing liability for workplace injuries to seamen, use the same standards and judicial interpretations that apply to the FELA. *Am. Dredging Co v Miller*, 510 U.S. 443, 455-56 (1994)

Years before *Rogers*, courts concluded that this Court's use of the term "proximate cause" in the early FELA cases deviated from the traditional definition of the term. As that Seventh Circuit explained:

> Perhaps the reconciliation of the earlier accepted, sometimes called the old-fashioned idea, of 'proximate cause' as the direct or efficient cause of the accident . . . in cases where [the FELA] applies, and the conception of proximate cause which now obtains, is to be found in the enlarging phrase of the statute. * * * Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'causal relation,' – if the injury or death resulted 'in part' from defendants' negligence, there is liability. The words 'in part' have enlarged the field or scope of proximate causes in these railroad injury cases.

Eglsaer v. Scandrett, 151 F.2d 562, 565-66 (7th Cir. 1945). Indeed, this Court, as well as lower courts, already recognized that the traditional understanding of proximate causation was inconsistent with the FELA's negligence scheme long before *Rogers*.[13]

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[13] For example, the Second Circuit found early on that proximate causation "in cases where the liability depends upon a failure of foresight" by the railroad should be further refined, such that a railroad would be liable where "the chain of events

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C. Any difference found in a handful of state supreme courts between the FELA language ("in whole or in part") and the *Rogers* interpretative language ("even the slightest") is mere semantic discrepancy.

At most, the variant applications of *Rogers* by a handful of state supreme courts are attributable to "different verbal formulations of the same underlying legal rule." Stephen G. Breyer, *Reflections on the Role of the Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006). These are not "actual divides among the lower courts" but merely "minor linguistic discrepancies" that "are not outcome determinative." *Id.*; *accord* R. Stern, E. Gressman, S. Shapiro and K. Geller, *Supreme Court Practice* 225 (8th ed. 2002) (to justify certiorari, "there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized"). In this regard, the "semantic difference" between the handful of state supreme court opinions that Conrail cites to in its Petition has not led to conflicting results; for the most part, these are merely "minor variations" that stem from the state supreme courts' "reword[ing]" of this Court's holdings. *Wash. v. Klem*, 497 F.3d 272, 279 (3d Cir. 2007).

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which resulted in plaintiff's injuries were not . beyond calculable foresight." *Cusson v. Can. Pac. Ry. Co* , 115 F.2d 430, 432 (2d Cir 1940) (Hand, J.)

Two state court decisions cited by Conrail appear to read *Rogers* more narrowly than the federal courts of appeals. *See, e.g., Marazzato v. Burlington N.R. Co.*, 817 P.2d 672, 674 (Mont. 1991) ("*Rogers* case was addressing the issues of multiple causes and contributory negligence after it had been established that the employer was negligent"); *Raab v. Utah Ry. Co.*, 221 P.3d 219, 228-30 (Utah 2009) (rejecting the argument that *Rogers* requires only "but for" causation; "[w]hile one could certainly read the Supreme Court's language in *Rogers* to speak to the standard of causation under FELA, this is not the best reading of the case"). The bottom line in *Raab*, so far as it concerns *Rogers*, is that *Rogers* did not do away with all causation except "but for" causation. *Raab*, 221 P.3d at 228-30. Even the *Raab* court, while rejecting mere "but for" causation, applied what can only be described as a relaxed standard of legal causation. In that case, a defective brake forced replacement of the lead locomotive, which in turn required plaintiff to enter a trailing locomotive to set the controls, where he hit his head on a low-hanging air conditioning unit. The court held that the jury was entitled to find that the defective brake "was a proximate cause" of plaintiff's injury. 221 P.3d at 222, 231. For the sake of clarity, the *Raab* court said it was rejecting the notion that only "but for" causation is required, not the relaxed causation standard.[14] In short, there is no

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[14] The *Raab* court contrasted its conclusion on this point with that of the Tenth Circuit in *Summers v. Mo. Pac. R.R. Sys.*,

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conflict among the lower courts in practice: Conrail does not cite a single case in which the "relaxed" standard was rejected in favor of what Conrail calls traditional "proximate cause."[15, 16]

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132 F.3d 599, 606 (10th Cir. 1997). *Raab*, 221 P.3d at 228-29 ¶ 32 & n.35. But what the *Summers* court found "definitely abandoned" in *Rogers* was the practice of "analyz[ing] liability under the FELA in terms of proximate causation." *Id.* (emphasis supplied). Neither *Summers*, nor any other case so far as we can tell, suggests that *Rogers* abandoned the concept that some "but for" causes are, for policy reasons, too remote to support liability.

[15] Indeed, several of the cases cited by Conrail cite *Rogers* as the standard by which "proximate cause" is measured. *Gardner v. CSX Transp., Inc.*, 498 S.E.2d 473 (W. Va. 1997), expressly declared that *Rogers* "established" "[t]he causation standard in FELA cases," and went on to quote *Rogers* "even the slightest" language. *Id.* at 482. The same is true of *Snipes v. Chi. Cent. & Pac. R.R. Co.*, 484 N.W.2d 162, 164-65 (Iowa 1992), which quotes *Rogers*' "even the slightest" language in order to show "[t]he liberality with which the Supreme Court has applied this test," *i.e.*, of FELA negligence and causation. Much the same is true of *Chapman v. Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991) ("An action brought under the Federal Employers' Liability Act must be submitted to a jury if the jury could reasonably find that "employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought.") (quoting *Rogers*); *accord Crafton v. Union Pac. R. Co.*, 585 N.W.2d 115, 123 (Neb. 1998) ("The quantum of evidence required to establish liability in a FELA action is lower than that required in an ordinary negligence action. The common-law standard of proximate cause is not applicable to FELA." (citations omitted)).

[16] Conrail's citation to *Reed v. Pennsylvania R. Co.*, 171 N.E.2d 718 (Ohio 1961), is particularly misleading. First, the proposition advanced by the railroad is contained in a footnote in *Reed* and is dictum. Second, and more importantly, the Ohio

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III. ON THE MERITS, THE STANDARD FOR CAUSATION UNDER FELA IS RELAXED.

In response to the horrific number of injuries that were occurring on a regular basis in the railroad industry, Congress, in 1906, enacted a precursor to the FELA. 40 Cong. Rec. 4607 (1906). In enacting the FELA, Congress implemented a system that moved railroad-worker protection away from the traditional common law and closer to the workers' compensation model. *See* 45 U.S.C. §§ 51, 53. Significant features of Congress' proposed new Act included its creation of liability for any injury "resulting in whole or in part" from the employer's negligence and abrogating the defense of pure contributory negligence, which previously barred a plaintiff's recovery if his negligence played any role in his injuries. *See* 45 U.S.C. §§ 51, 53. These features of the FELA reflected Congress' goal to shift financial responsibility for injured railroad workers from those least able to carry that burden; from the worker and their families, to the railroads. *See Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 161 (2003); *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994).

Congress rejected numerous attempts to introduce features to the FELA that would limit this

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Supreme Court supplanted *Reed* in *Vance v. Consolidated Rail Corp*, 652 N.E 2d 776, 782 (Ohio 1995) ("we are bound to follow the unique body of federal decisional law interpreting the FELA") In almost 40 years, no other court has cited the *Reed* decision for the proposition advanced by Conrail in its Petition.

remedial function. *See, e.g.*, H.R. Rep. No. 60-1386, at 79, 80 and 92 (1908). Consistent with these goals, Congress amended the FELA in 1939 to ensure the financial protection of injured railroad workers by expanding the class of covered employees, eliminating the defense of assumption of the risk and penalizing intimidation of workers who provide information about accidents and other incidents. *See* 45 U.S.C. §§ 51, 54, 60. Congress adopted the 1939 amendments in order to ensure that the goal of expanding compensation for workers was not thwarted by judicial introduction of common law concepts into the statute. *See Rogers*, 352 U.S. at 508-09. At the same time, and for the same reason, Congress expressly declined a revision to the FELA that would have equated the "in whole or in part" language of section 1 with proximate cause.[17]

The 1939 amendments show Congressional intent to clarify that the FELA departs from the

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[17] *Compare* 42 Cong. Rec 10,710 (1939) (proposed amendment in 1939. "In any action brought against any common carrier . such employee shall not be held to have the risks of his employment in any case where . . . the negligence of such common carrier, its officers, agents, or employees, *proximately contributed* to the injury or death of such employees.") (emphasis added) *and* H.R. Rep No 75-2153, at 1 (1938) (similar proposed amendment in 1938) *with* 45 U S.C. § 54 ("In any action brought against any common carrier . . such employee shall not be held to have assumed the risks of his employment in any case where such injury or death *resulted in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier . . ") (emphasis added).

common law and undermine reliance on pre-1939 FELA decisions that ostensibly adopt a common law proximate cause approach. And, in the wake of *Rogers* and federal circuit law broadly interpreting *Rogers*, Congress has not taken any action to amend the "in whole or in part" language. As the Seventh Circuit Court of Appeals recently noted:

> We will not assume that Congress is unaware of the judicial gloss that the [FELA] has received. If the Act as it has been interpreted and applied does not correctly reflect what was intended by the legislative branch then the change must be made there. The duty of this court is to follow what is now well-established authority.

Heater v. Chesapeake & Ohio Ry. Co., 497 F.2d 1243, 1246 (7th Cir. 1974).

To interpret the FELA as requiring strict adherence to traditional proximate cause would be inconsistent with the "humanitarian purposes" at the FELA's core, as it would push railroad workers closer to the traditional common law scheme that Congress was seeking to avoid. *See Gottshall*, 512 U.S. at 542-43. In the intervening decades, this Court has consistently recognized that Congress' avowedly beneficial purpose in enacting the FELA requires a policy of liberal interpretation so as to accomplish that

purpose. *See, e.g., Rogers*, 352 U.S. at 508-510;[18] *Urie v. Thompson*, 337 U.S. 163, 180 (1949);[19] *see also Gottshall*, 512 U.S. at 543.

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[18] Conrail also argues that *Rogers* speaks only to issues of multiple causation. Although *Rogers* certainly addressed the role of plaintiff's contributory negligence, it did so only in the broader context of what evidence was necessary to present a jury question on whether a defendant's negligence caused plaintiff's injury. Any suggestion that only comparative negligence was at issue in *Rogers* is, quite simply, incorrect.

[19] Conrail attempts to find in *Urie v. Thompson*, 337 U.S. 163 (1949), a hard and fast rule that the FELA adopted then existing common law except where otherwise stated (Pet. at 26 n.13); but the *Urie* Court looked, not merely to the common law, but also to another contemporaneously enacted statute, *id.* at 184, "the spirit the statute [the FELA] contemplated for its administration and application," *id.* at 186, "the breadth of the statutory language, the Act's humanitarian purposes, its accepted standard of liberal construction in order to accomplish those objects, the absence of anything in the legislative history indicating a congressional intent to require a restricted interpretation or expressly to exclude such occupational disease, and the trend of existing authorities dealing with the question. . . ." *Id.* at 181. This last point is worth additional attention. Citing just four lower court cases, "[n]ot all of [which] could be sustained" under Conrail's interpretation, the *Urie* Court wrote: "We would be most hesitant to adopt a construction of 'injury' as used in this Act which would overrule the decisions last cited or seriously impair their authority." *Urie*, 337 U.S. at 186.

IV. THERE IS NO REASON TO GRANT THE PETITION FOR CERTIORARI TO CONSIDER THE OHIO COURT OF APPEAL'S READING OF 49 C.F.R. § 229.43.

Section 229.43 of the Code of Federal Regulations, Title 49, provides:

> Products of combustion **shall** be released **entirely outside the cab** and other compartments. Exhaust stacks shall be of **sufficient height**. . . . to prevent entry of products of combustion into the cab . . . under usual operating conditions.

49 C.F.R. § 229.43 (emphasis added). Conrail argues that the Ohio appellate court wrongly found that Conrail violated § 229.43 by permitting infiltration of diesel exhaust into its locomotives, before the diesel exhaust ever even reached the exhaust stacks, without regard to whether *enough* diesel exhaust entered the locomotive to violate specific exposure levels set by OSHA. According to Conrail, the regulation is only violated if OSHA "permissible exposure levels" are exceeded, and the Ohio courts' contrary construction of the regulation conflicts with decisions of this Court commanding deference to the Federal Railroad Administration's supposed administrative construction of the regulation. Conrail's argument is off the mark.

The Ohio appellate court specifically held:

> The plain language of the rule is more persuasive. Although [Conrail] argues that the

> thrust of the rule is about stack heights, it is clear that the intent of the rule is to protect occupants of a locomotive cab from exposure to toxic exhaust emissions during normal operating conditions. It is directed that such exhaust be released entirely outside the cab and that the railroad shall vent the exhaust through stacks of sufficient height or provide 'other means' to prevent the exhaust from entering the cabin in normal operation. We see no ambiguity here.

Pet. App. 10a ¶ 38. The Ohio court did not disregard Supreme Court precedent on deference to agency construction of a regulation. Rather, the court followed the principle, clearly established by this Court, that a court may **not** accept a purported administrative construction of a regulation that conflicts with the regulation's unambiguous terms. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 513 (1994) (deference to administrative agency is appropriate "unless 'an alternative reading is compelled by the regulation's plain language' ").

Conrail's real objection to the Ohio court's ruling is not that it conflicts with precedents of this Court; rather, Conrail's disagreement is with the lower court's reading of this particular regulation, which is a subject this Court has never spoken to, and thus is not a subject on which it is possible for there to be a "conflict" with this Court's prior rulings. Not only does Conrail point to no conflict with any of this

Court's rulings, it points to no other appellate decision in any jurisdiction construing 49 C.F.R. § 229.43 in a way that conflicts with that of the Ohio courts; indeed, it points to no other appellate decisions interpreting the regulation in any way. Conrail's argument is merely that one intermediate state appellate court has rendered a reading of a regulation based on the plain language of the regulation, with which Conrail disagrees. A claim of mere error of a lower state court, on an issue apparently never before litigated at the appellate level does not come close to meriting review under Supreme Court Rule 10.

In any event, Conrail's claim that the lower court erred in construing the plain language of the regulation is not persuasive. Conrail makes virtually no effort to square its contention that the regulation is violated only if OSHA's diesel exposure limits are violated with the unambiguous text of the regulation, which nowhere mentions the level of exposure and instead provides clearly: "[p]roducts of combustion **shall** be released **entirely outside the cab** and other compartments." 49 C.F.R. § 229.43 (emphasis added). And even if there were some room for interpretation of the language, the purported administrative construction on which Conrail relies (a report to Congress) is not one that is entitled to deference. *Accord, e.g., Christensen v. Harris County*, 529 U.S.

576 (2000).[20] The Ohio appellate court understood the "interpretation" of the regulation proffered by Conrail cannot trump the plain and unambiguous meaning of the regulation.

Conrail's concern that application of the plain language of the regulation would make it "virtually impossible for railroads to defend" unless the cab of the locomotive is "airtight" (Pet. 30), is fanciful. A single intermediate state court ruling is an exceedingly slender basis for Conrail's predictions of the tremendous difficulties that it sees in application of the plain language of the regulation. Moreover, Conrail exaggerates the effect of the ruling by overlooking that to establish liability, a worker will still need to establish not only that diesel fumes entered a

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[20] *Christensen v Harris County*, 529 U.S 576 (2000), teaches:

> Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron* [*U.S.A , Inc v. Natural Res Def Council, Inc.*, 467 U S 837 (1984)] – style deference. . . . [they] are 'entitled to respect' . . . but only to the extent that they are persuasive, . . . which is not the case here * * * [and] deference [to an agency's interpretation of its regulation] is warranted only when the language of the regulation is ambiguous The regulation in this case, however, is not ambiguous . . .

529 U S. at 579; *see also United States v. Mead Corp.*, 533 U S 218 (2001)

locomotive in violation of the regulation, but also that exposure to those fumes was a cause of actual, compensable injuries.

And, here, as perhaps has been belabored above, the unrebutted evidence established that the diesel exhaust exposure on the Conrail locomotives that Mr. Battaglia worked was egregious (*see supra* note 2, explaining that the Conrail locomotives at the Detroit, Michigan yard were in particularly bad condition). Diesel exhaust was coming into the locomotive cabs from bulk head electrical cabinets and cracks in the floor and firewalls, and then, as a matter of course, the exhaust was **not** being "released entirely outside the cab and other compartments." Some diesel exhaust **was not even making it into the stacks**; diesel exhaust was being released directly into the locomotive cab. Pet. App. 30a. Furthermore, those fumes that **were** making it out of the stacks were being carried back in through the cracks in the seals around the windows and doors because the "exhaust stacks (were not) of sufficient height" to prevent their entry into the cab, in addition to the seals which were worn out and malfunctioned permitting fumes to come back in. This is much more than exposure to merely some fumes, and goes well beyond the locomotive cab merely being not "airtight." If there is any reason to go beyond the plain language of

section 229.43 in order to avoid potential burden to the railroads, this is not the case to do so.[21]

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[21] Conrail's suggestion in footnote 16 that Mr. Battaglia was required to present "quantitative evidence" is troublesome. *Hardyman v. Norfolk & W. Ry Co.*, 243 F.3d 255 (6th Cir. 2001), teaches, in an FELA case involving carpal tunnel syndrome

> We further recognize that it makes little sense to require a plaintiff to establish a dose/response relationship or threshold level in a situation where there has been no scientific study conducted specifically on railroad brakemen and where the dose/response relationship or threshold level will always vary from individual to individual. Such a requirement essentially would foreclose plaintiffs from recovering for [an injury] against negligent employers unless their particular job has been the subject of a national, epidemiological study on [that injury].

243 F.3d at 265 Conrail asks this Court to read into a regulation a quantitative evidence requirement not only that is nowhere in the regulation itself, but also that cannot be met. There was no evidence of any national, epidemiological studies relative to diesel exhaust proffered by Conrail in this case. Neither the FRA nor OSHA apparently has performed any such studies on Conrail locomotives. And Conrail has not cited to any testing that it has ever performed or permitted on any of its locomotive fleet, much less on its fleet in the Detroit, Michigan area.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

FRANCIS BATTAGLIA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Sixth Appellate District

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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5 Sand et al., *Modern Federal Jury Instructions—Civil* (3d ed. 2006)..... 7

REPLY BRIEF

In its petition, Conrail showed that there is a deep and persistent conflict among the federal appellate courts and state high courts as to the standard for causation under the Federal Employers' Liability Act ("FELA"). Pet. 14-22. Conrail explained that Justices of this Court had recognized that conflict in *Norfolk Southern Railway* v. *Sorrell*, 549 U.S. 158 (2007), and that this case directly implicates that conflict because the grant and affirmance of summary judgment was predicated upon the application of a lower standard of causation based on language from *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500, 508 (1957). Pet. 22-24. Conrail also showed that review should be granted as to the second question because the decision below conflicts with this Court's decisions setting forth the deference that courts owe to an agency's interpretation of its regulations. *Id.* at 28-31.

Respondent's Opposition ("Opp.") does not undermine these conclusions. As to causation under FELA, respondent acknowledges a conflict among the lower courts. Opp. 20 ("Two state court decisions cited by Conrail appear to read *Rogers* more narrowly than the federal courts of appeals."). That conflict is not a "mere semantic discrepancy." *Id.* at 19. Rather, this Court has acknowledged the "signify-can[ce]" of the "substantive content of the causation standard" under FELA, *Sorrell*, 549 U.S. at 165, and respondent has no response to Conrail's showing that the "even the slightest" standard will be outcome determinative in a wide-array of FELA cases. Pet. 22-24.

Contrary to respondent's scattershot argument (Opp. 6-14), this case is an appropriate vehicle to resolve that conflict. The trial court granted

summary judgment under a "relaxed" standard of causation because it concluded that respondent showed that his exposure to diesel fumes "contributed to any degree, even the slightest, to Plaintiff's asthma." Pet. App. 32a. That ruling was affirmed by the court of appeals, which was presented and passed on the proper standard for causation under FELA. *Id.* at 11a As a result, adoption of a "proximate cause" standard by this Court, at a minimum, would require vacatur of the judgment below.

Finally, as to the second question presented, respondent cannot avoid the conclusion that the courts below improperly disregarded the Federal Railroad Administration's ("FRA's") interpretation of the relevant safety regulation. That disregard conflicts with this Court's decisions and warrants review. If left uncorrected, the decision below would impose an impossible burden on railroads to make their locomotives "airtight" without regard to whether levels of diesel exhaust are even sufficient to cause injury to a railroad's employees.

The petition for writ of certiorari should be granted.

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT OVER THE STANDARD FOR CAUSATION UNDER FELA.

1. Respondent's argument that this case is an inappropriate vehicle is meritless. Opp. 6-14.

Conrail timely raised its challenge below. In its opening brief to the court of appeals, Petitioner explained that the "trial court's reliance on" the "'contributed to any degree, even the slightest'"

standard "was misplaced." Conrail Br. at 15.[1] Battaglia responded that, under FELA, "a railroad is liable to an injured employee if the railroad's 'negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" Brief of Appellee, Francis Battaglia at 19, *Battaglia* v. *Consol. Rail Corp.*, No. L-08-1332 (Ohio Ct. App. Mar. 4, 2009) (quoting *Rogers*, 352 U.S. at 506). In reply, Conrail again challenged the standard set forth in *Rogers*, explaining that, under FELA, a plaintiff instead "must prove that 'negligence was the proximate cause in whole or in part' of the employee's injury," Conrail's Reply at 4-5 (quoting *Tennant* v. *Peoria & Perkin Union Ry.*, 321 U.S. 29, 32 (1944)), and that "the Supreme Court has emphasized that the requirement of proximate causation must still be met," *id.* (citing *Coray* v. *S. Pac. Co.*, 335 U.S. 520, 423 (1949)).[2]

Further, Conrail's challenge is squarely before the Court because "[t]here can be no question as to the proper presentation of a federal question when the highest state court passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436-37 (1959); *accord* Stern & Gressman et al., *Supreme Court Practice* § 3.19, at 185 (8th ed.

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[1] Conrail referenced *Aparicio* v. *Norfolk & W. Ry.*, 84 F.3d 803, 808 (6th Cir. 1996), which was cited by the trial court for the "even the slightest" standard for causation. Pet. App. 32a. *Aparicio* took the "even the slightest" language from *Rogers*. 84 F.3d at 807-09.

[2] In opposing summary judgment on respondent's FELA claim, Conrail argued that plaintiff "must still demonstrate some negligence and proximate cause." Conrail's Opposition to Plaintiffs' Motion for Summary Judgment on Count One (FELA) at 6. Conrail highlighted that plaintiff's expert had previously concluded that respondent suffered from "asbestosis" but had *not* diagnosed him with the asthma for which he obtained $2.6 million in damages. Opposition to Summary Judgment, Ex. C.

2002). Here, the Ohio court of appeals held that, under FELA, "[a]n injury sustained by a railroad worker that is caused in any degree, even the smallest, by the negligence of the employer, results in the obligation of the employer to pay damages." Pet. App. 11a (citing *Rogers*, 352 U.S. at 508; *Aparicio*, 84 F.3d at 808). Applying that legal standard, the court of appeals affirmed the trial court's conclusion that summary judgment was warranted because exposure to diesel exhaust "contributed to any degree, even the slightest, to plaintiff's asthma." *Id.* at 32a (citing *Aparicio*, 84 F.3d at 803). The court of appeals passed on the proper standard for showing causation under FELA.

Finally, contrary to his argument, the "difference between 'even the slightest' causation and so-called 'proximate cause'" was a critical issue below. Opp. 9. Respondent argued in his summary judgment motion that under the relaxed FELA standard he need not "prove that exposure to diesel exhaust *was* the proximate cause of [his] asthma" but only that "exposure to diesel exhaust was *a* contributing cause, at least in some small way, of Mr. Battaglia's asthma." Motion for Summary Judgment at 13. This issue was essential because respondent admitted that it was "very possible that there were other causes that *also* contributed to his asthma" but they were irrelevant under FELA's "*contributed to any* degree, even the slightest" causation standard. *Id.* at 12, 13.[3]

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[3] Respondent's expert's report suggested other causes, *e.g.*, respondent's respiratory problems also were "associated with his [exposure to] asbestos," which was unrelated to exposure to diesel exhaust. Motion for Summary Judgment, Ex. B. to Affidavit Dr. Kelly at 2. Moreover, an expert's opinion would not compel judgment on an issue where plaintiff bears the burden of proof because "'it is for the jury to decide whether any,

As such, this case is an ideal vehicle for resolving this conflict because a favorable ruling from this Court would require vacatur of the judgment below to allow reconsideration of the record under the appropriate "proximate cause" standard. See *Sorrell*, 549 U.S. at 172.[4]

2. Respondent does not and cannot dispute that there is a conflict among the federal appellate courts and state courts of last resort over the standard for causation under FELA. For example, in *Marazzato* v. *Burlington Northern Railroad*, 817 P.2d 672 (Mont. 1991), the court held that *Rogers* did not do away with the requirement that a plaintiff must show that "defendant's negligence was the proximate cause in whole or in part" of the claimed injury. *Id.* at 675. Likewise, the Utah Supreme Court, relying upon this Court's decision in *Sorrell*, held that *Rogers* did not eliminate the "proximate cause requirement" in FELA actions. *Raab* v. *Utah Ry.*, 221 P.3d 219, 230 (Utah 2009). Given these rulings, respondent admits that "[t]wo state court decisions cited by Conrail

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and if any what, weight is to be given to the [expert's] testimony'" and that is so "'even if such testimony [is] uncontradicted.'" *Sartor* v. *Ark. Gas Corp.*, 321 U.S. 620, 627 (1944) (Jackson, J.).

[4] Respondent seeks to distinguish *Rhodes* v. *Firestone Tire & Rubber Co.*, No. 08AP-314, 2008 WL 4368480, at *3-4 (Ohio Ct. App. Sept. 25, 2008), arguing that it turned on the expert's failure to opine with a "'reasonable degree of engineering probability.'" Opp. 8 n.5. In *Rhodes*, the court ruled that the expert did not satisfy traditional proximate cause because he identified the alleged defect as one of three "'possible' causes." 2008 WL 4368480, at *3-4 Here, respondent admitted that it was "very possible" that there were other "other causes" of his asthma, but argued they were irrelevant under the "relaxed standard of causation under the FELA." Motion for Summary Judgment at 12, 13.

appear to read *Rogers* more narrowly than the federal courts of appeals." Opp. 20. See *Sorrell*, 549 U.S. at 173 n.* (Souter, J., concurring) (recognizing division of authority).

Respondent argues review should be denied because the conflict involves only a "handful of state supreme courts" and "the 'semantic difference' between the handful of state supreme courts opinions . . . has not led to conflicting results." Opp. 19. Resolution of conflicts between federal courts of appeals and state high courts is a principal reason for granting certiorari. Sup. Ct. R. 10(b). Moreover, resolution of that conflict is critical here because state and federal courts exercise concurrent jurisdiction over FELA. *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949); see also 45 U.S.C. § 56. Therefore, state and federal courts in the same state currently are applying conflicting legal standards on a core element of an important federal statute. Compare *Raab*, 221 P.3d at 229 (Utah), with *Summers* v. *Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997); compare *Marazzato*, 817 P.2d at 675 (Mont.), with *Ogelsby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 609 (9th Cir. 1993).

Nor can this conflict be dismissed as a "mere semantic discrepancy." Opp. 19-20. In *Sorrell*, the full Court explained that the issue of "the substantive content of the causation standard" under FELA was "significant," 549 U.S. at 165, and four Justices wrote or joined separate opinions highlighting the conflict among the courts on this issue and expressing their views on whether *Rogers* "smuggled proximate cause out of the concept of defendant liability under FELA." *Id.* at 173 n* (Souter, J., concurring); see *id.* at 177 (Ginsburg, J., concurring in judgment).

The conclusion that the substantive standard for assessing causation is an important issue is

inescapable. Indeed, allowing a plaintiff to argue to a court or to a jury that the defendant is liable if its negligence "played any part, even the slightest" in causing an injury will have a concrete impact on the resolution of virtually every case under FELA. 5 Sand et al., *Modern Federal Jury Instructions—Civil* ¶ 89.02, at 89-44 (3d ed. 2006); see also Br. of Ass'n of American Railroads as *Amicus Curiae* at 6-11 ("AAR Br.") (explaining that causation standard for FELA claims will have "substantial and decisive impact").

Moreover, on this point, the suggestion that the conflicting legal standards do not lead "to conflicting results" is demonstrably wrong. Opp. 19. Conrail previously highlighted that the Second Circuit has held that the standard for causation has a concrete impact on the resolution of FELA cases. Pet. 22 (discussing *Syverson* v. *Consol. Rail Corp.*, 19 F.3d 824, 825-28 (2d Cir. 1994)). In *Syverson*, the court of appeals acknowledged that the trial court's grant of summary judgment "would have been quite appropriate had this been a negligence action," 19 F.3d at 828, but it reversed because the standards for causation "normally applied in summary judgment are substantially diluted" under FELA, *id.* at 825. Respondent has no response to this holding or the broader point that "the proper standard for showing causation, whether reflected in jury instructions, rulings on dispositive motions (as in this case), or appellate review, surely can affect the outcome of a FELA case." AAR Br. 7-8.

3. Finally, respondent argues that review should be denied because "on the merits," the court below applied the proper legal standard. Opp. 22-25. That argument is wrong, and, in all events, provides no basis for denying review in this case.

On the merits, respondent argues that FELA should not be interpreted as "requiring strict adherence to traditional proximate cause" and instead should be read as adopting a "relaxed" causation standard that "shift[s] financial responsibility for injured railroad workers . . . to the railroads." Opp. 22, 24. As this Court explained in *Sorrell*, "FELA was indeed enacted to benefit railroad employees, ... [but] [i]t does not follow . . . that this remedial purpose requires us to interpret every uncertainty in the Act in favor of employees." *Sorrell*, 549 U.S. at 171. Instead, "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law." *Id.* at 165-66 (citing *Urie*, 337 U.S. at 182). And, "the prevailing view when FELA was enacted in 1908" was that in a negligence action, "'the defendant's negligence must have been a proximate cause in order to give any right of action.'" *Id.* at 166-67 (quoting 1 T. Shearman & A. Redfield, *Law of Negligence* § 94, at 143-44 (5th ed. 1898)).

Although FELA provides that a railroad is liable for injury "resulting in whole or in part from the negligence" of defendant, 45 U.S.C. § 51, this statutory language says nothing "about the familiar proximate-cause standard for claims . . . of a defendant-employer's negligence." *Sorrell*, 549 U.S. at 174 (Souter, J., concurring). Likewise, as explained by Justice Souter, the Court's cases "throughout the half-century between FELA's enactment and the decision in *Rogers* . . . consistently recognized . . . proximate cause as the proper standard in FELA suits." *Id.* As such, "*Rogers* left the law where it was." *Id.*

To be sure, this view has not garnered unanimous support. Justice Ginsburg appears to have embraced

a different view of FELA, concluding that *Rogers* sets forth the test for "proximate causation applicable in FELA suits." 549 U.S. at 178 (Ginsburg, J., concurring in judgment). And, as respondent notes, cases from this Court decided since *Rogers* have been read by the lower courts for the proposition that FELA does not require a showing of proximate causation. But, as the Utah Supreme Court has ruled, "the Court's recent opinion in [*Sorrell*] strongly indicates that the [Supreme] Court has never squarely addressed the issue of *Roger's* impact on proximate cause." 221 P.3d at 228 (footnote omitted).

Respondent's views on the merits highlight the conflict among the lower federal courts. Review should be granted to resolve that conflict.

II. REVIEW SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASES REGARDING THE DEFERENCE DUE TO AN AGENCY'S INTERPRETATION OF ITS REGULATIONS.

The decision below also conflicts with this Court's decisions regarding the deference due to an agency's interpretation of its regulations. Pet. 28-31.

Respondent does not dispute that an agency's interpretation of its own regulations must "be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted). Under the regulation at issue, the FRA has concluded that allowing properly vented exhaust to migrate into the locomotive cab only violates the regulation if the exhaust exceeds

OSHA's exposure thresholds. Pet. 29.[5] The court below, Pet. App. 10a, did not dispute that this is FRA's position, nor did it assess whether FRA's interpretation was "plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.*, 512 U.S. at 512 (internal quotation marks omitted).[6] As a result, under this Court's cases, the court of appeals should have deferred to the agency's interpretation.

Respondent disagrees, arguing that the court below did not "disregard Supreme Court precedent on deference to agency construction of a regulation" but instead rejected "a purported administrative construction that conflicts with the regulation's unambiguous terms." Opp. 27. That reading of the ruling below is unpersuasive. The court of appeals did not conclude that FRA's interpretation of its regulation was impermissible, but instead concluded that its own interpretation of the "plain language" of the regulation "*is more persuasive.*" Pet. App. 10a (emphasis added). It is, however, the agency's role to decide "which among several competing interpretations best serves the regulatory purpose." *Thomas Jefferson Univ.*, 512 U.S. at 512.

Nor can the adverse impact of that ruling be dismissed. The decision below requires railroads to ensure that locomotive cabs are "airtight" because "if

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[5] The FRA's interpretation of § 229.43 properly takes into account exposure to diesel exhaust levels deemed "toxic" by OSHA while recognizing that railroads simply cannot, in all circumstances, "prevent the entry of some fumes into the cab." 45 Fed. Reg. 21,092, 21,098 (Mar. 31, 1980).

[6] Respondent's claim (Opp. 28) that the "administrative construction on which Conrail relies (a report to Congress) is not one that is entitled to deference" is mistaken. *E.g. Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 417 (1945) (deferring to an agency's review reflected in congressional report).

during normal operation exhaust enters the cab, the rule is violated." Pet. App. 11a. Respondent argues that "[a] single intermediate state court ruling is an exceedingly slender basis for Conrail's predictions of the tremendous difficulties it sees in application of the plain language of the regulation." Opp. 29. But, as explained by *amicus* AAR, the refusal to defer to FRA's interpretation "has the effect of potentially rendering every locomotive used by railroads to be in violation of federal law." AAR Br. 21-22.

Finally, and somewhat ironically, respondent argues that the ruling's impact is tempered by the fact that a plaintiff must prove actual causation. Opp. 29-30. Under respondent's view of FELA, however, that is cold comfort because a plaintiff would need not prove proximate cause but instead could establish liability based solely on evidence that diesel exhaust "*contributed to any degree*, even the slightest, to [plaintiff's alleged injury]." Plaintiff's Motion for Summary Judgment at 12.

CONCLUSION

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

FRANCIS BATTAGLIA,
Respondent.

On Petition for a Writ of Certiorari To the Court of Appeals of Ohio, Sixth Appellate District

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

FRANCIS BATTAGLIA,
Respondent.

On Petition for a Writ of Certiorari To the Court of Appeals of Ohio, Sixth Appellate District

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ

[1] In accordance with Rule 37.2.(a), AAR has provided notice of its intent to file this brief to counsel for petitioner and respondent. The parties have consented to AAR's filing of an *amicus* brief. Letters expressing consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry, including participation as *amicus curiae* in cases raising significant legal and policy issues.

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, presents such issues. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. FELA presents unique issues and problems for railroads because, as a negligence law, it differs fundamentally from the no-fault compensation systems that cover virtually all other U.S. industries. Each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads, to which they devote substantial legal and financial resources: all told, the railroads spend three quarters of a billion dollars annually in the payment and defense of FELA claims. Because FELA litigation is an ongoing event for all major railroads, AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA.

Echoing prior decisions of some other lower state and federal courts, the court below erroneously sanctioned the application of a relaxed standard of causation in FELA cases, a ruling that is at odds with the plain language of the statute, Congressional intent and prior decisions of this Court and other courts. This issue is relevant in virtually every FELA lawsuit, and numerous lower court decisions demonstrate that the way in which causation is interpreted can affect the outcome of a case. Therefore, AAR members, who make up the vast majority of FELA

defendants, have a strong interest in seeking definitive guidance from this Court on the standard of causation.

AAR's members also are greatly concerned over the lower court's failure to defer to the Federal Railroad Administration's (FRA) interpretation of an important federal railroad safety regulation. The ruling that the regulation was violated if any diesel exhaust enters a locomotive cab, which was contrary to FRA's the interpretation of a rule that it promulgated and enforces, amounted to a finding that the defendant was negligent as a matter of law. As with the court's ruling on causation, this ruling has the potential greatly, and improperly, to expand FELA liability in a manner inconsistent with the view's of the expert federal agency.

When AAR participates as *amicus curiae* in a FELA case, it brings a broad, industry-wide perspective to the issues before the court. AAR works closely with its member railroads on a host of issues arising under FELA. Moreover, AAR has had long-standing involvement with the subject of rail safety, and participates in all significant railroad safety rulemaking proceedings conducted by the FRA. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members both in FELA litigation and in the field of safety regulation. As a trade association representing the nation's major railroads, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

STATEMENT OF THE CASE

AAR adopts the Statement of the Case of Petitioner.

SUMMARY OF THE ARGUMENT

This Court should grant the petition in order to provide guidance on a fundamental issue arising under FELA that has been the source of confusion and lack of uniformity for many years: the proper standard of causation. Time and again, in providing jury instructions, ruling on dispositive motions, and in reviewing such matters on appeal, some lower courts have held that a more "relaxed" burden applies to plaintiffs in proving causation in FELA cases than would in ordinary common law actions. Many of those decisions demonstrate that how courts interpret causation can have a significant impact on the outcome of a case. In contrast, other courts hold that FELA plaintiffs must show proximate cause. Only clarification of the proper standard of causation by this Court will end the intolerable lack of uniformity on this fundamental issue.

The language and legislative history of the statute, and early decisions of this Court, show that Congress did not intend to modify the common law standard of causation when it enacted FELA in 1908. Congress expressly modified some of the prevailing common law defenses that made recovery more difficult, including the traditional contributory negligence doctrine, but these modifications did not address the causation standard. Consequently, in the years following FELA's enactment this Court consistently held that plaintiffs had to prove their injuries were proximately caused by the defendant's negligence. Neither subsequent amendments to FELA, nor this

Court's decision in *Rogers v. Missouri Pac. R.R.*, offers support for lower court decisions that hold otherwise.

The lower court's failure to defer to the FRA's interpretation of its own safety regulation, which will have profound implications for the rail industry's locomotive fleet, also warrants granting the petition. The court below held that evidence of the presence of any diesel exhaust in a locomotive cab constitutes a violation of 49 C.F.R. §229.43(a), requiring a finding of negligence per se under FELA. However, the language of the regulation does not remotely compel such a conclusion. Consistent with the regulation's language and intent, FRA's enforcement efforts have focused on defects in a locomotive exhaust system and the sufficiency of stack heights. In addition, FRA has stated that it utilizes the OSHA diesel exhaust criteria to determine compliance. This interpretation, which the court rejected, is entitled to deference because it is entirely consistent with the language of the regulation and plainly reasonable under the circumstances.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION AND CLARIFY THE PROPER STANDARD OF CAUSATION UNDER FELA BECAUSE IT IS A FUNDAMENTAL ISSUE ARISING UNDER THE STATUTE WHICH CONTINUES TO BE THE SUBJECT OF CONFUSION AND LACK OF UNIFORMITY IN THE LOWER COURTS

As in any negligence action, causation is a fundamental issue in litigation arising under FELA. *See e.g., Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir. 1990) (A FELA plaintiff must "prove the

traditional common law elements of negligence: duty, breach, foreseeability, and causation"). During the statute's first fifty years causation was a straightforward and non-controversial issue, but has since become muddled and confused. Echoing this confusion, the Kentucky Supreme Court recently observed that "[t]he [U.S.] Supreme Court has yet to state clearly whether *Coray*, *Carter*, and *Rogers* altered the common-law proximate cause standard," and noted further that "[t]he court declined to address what the causation standard should be in *Norfolk Southern v. Sorrell.*" *CSX Transp., Inc. v. Begley*, ___ S.W.3d ___, 2010 WL 2016531, at *5 (Ky. 2010). This case presents an excellent opportunity for this Court to answer the question left unresolved in *Sorrell*, and provide much needed clear and definitive guidance on the proper standard of causation under FELA.

A. The Erroneous Interpretation of FELA's Causation Standard By the Court Below and Other Lower Courts Has and Will Continue to Have A Substantial and Decisive Impact on the Outcome of FELA Cases

Commenting on the disarray that existed on causation even in 1968, the California Court of Appeals observed that "[i]t is almost impossible to frame a definition of causation for F.E.L.A. cases . . . because the federal decisions cannot themselves be fully harmonized on the subject." *Parker v. Atchison, Topeka & Santa Fe Ry. Co.*, 263 Cal.App.2d 675, 678, 70 Cal. Rptr. 8, 10 (Cal. App. 1968). As the Petition describes, this confusion and lack of uniformity has only increased, to the point where there presently is a serious split of authority in the lower federal and state courts on the standard of causation that applies

in FELA cases. [Pet. at 16-21] Some lower courts erroneously ascribe to this Court's decision in *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957), an intent to "relax" the standard of causation under FELA, often utilizing colorful metaphors to describe this alleged statutory metamorphosis.[2] For example, the Seventh Circuit explained that to sustain a jury verdict in a FELA case requires "evidence scarcely more substantial than pigeon bone broth." *Harbin v. Burlington Northern Ry. Co.*, 921 F.2d 129, 132 (7th Cir. 1990); *see also, Rivera v. Union Pac. R.R.*, 378 F.3d 502, 506 (5th Cir. 2004)(calling the plaintiff's burden of proof "featherweight"). Here, the Ohio Court of Appeals relied on *Rogers* for the conclusion that a railroad is liable under FELA if its negligence "in any degree, contributes . . . even in the slightest degree" to the plaintiff's injury. *Battaglia v. Consolidated Rail Corp.*, 2009 WL 3325903, at *3-4 (Ohio App. 6 Dist. 2009). Agreeing that plaintiff satisfied his burden under this standard, the Court affirmed the grant of summary judgment for plaintiff on causation, taking that issue from the jury. *Id.* at *6.

This issue is of great importance because the determination of the proper standard for showing causation, whether reflected in jury instructions, rulings on dispositive motions (as in this case), or appellate

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[2] *E.g., Williams v. Long Island R.R. Co*, 196 F.3d 402, 406 (2d Cir. 1999); *Oglesby v. Southern Pac. Transp Co.*, 6 F.3d 603, 606-07 (9th Cir. 1993). Recently, a district court in Indiana agreed with the defendant that "the causation evidence in the record as it stands is tenuous" but nonetheless denied the defendant's motion for summary judgment "in light of the featherweight standard of proof required" under FELA. *Grogg v. CSX Transp., Inc.*, 659 F.Supp.2d 998, 1005 (N.D. Ind. 2009).

review, surely can affect the outcome of a FELA case. Perhaps no better example exists of how the standard of causation can be outcome determinative than the Fifth Circuit's opinion in *Armstrong v. Kansas City Southern Ry. Co.*, 752 F.2d 1110 (5th Cir. 1985). In *Armstrong*, the railroad had hired a local cab company to transport the plaintiff from the point where he disembarked from a train late at night to the railroad's yard offices. In route, the driver stopped the cab on the road without turning on the emergency flashers. The cab was hit from the rear by another motorist, injuring the plaintiff. Asserting that the "common-law proximate cause standard is modified and the employee has a less demanding burden of proving causal relationship," *id.* at 1113, the Court affirmed the jury's verdict finding the railroad liable, allowing the jury a wide berth to make inferences supporting its verdict.

Armstrong also involved a state law indemnity action by the railroad against the cab company, its agent.[3] Under the very same set of facts, the Court of Appeals affirmed the denial of the railroad's claim, upholding the lower court's finding that the cab driver was not negligent. The Court held that "even though the jury found that [defendant] was liable to Armstrong [in the FELA action] because of the negligent conduct of its agent, the district court was neither constrained nor required to find the negligence of [the cab company] proximately caused Armstrong's injury." *Id.* at 1115. The Court ex-

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[3] In *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003), this Court held that while joint and several liability applies to FELA, railroads have the right to bring indemnity and contribution actions against third parties under applicable state or federal law. *Id.* at 162.

plained that the railroad's "argument ignores the different causation standards of the two actions . . . The standards of liability for negligence under §1 of [FELA] are significantly broader than in ordinary common-law negligence actions." *Id.* Thus, the very conduct that gave rise to liability in the FELA action, did not support liability in the indemnity action, an outcome directly attributable to the Court's ruling that a different, "significantly broader" standard of causation applies under FELA. *Id.*[4]

Other examples of the impact of FELA's purported "relaxed" causation standard abound. In ruling on a railroad's summary judgment motion, a federal district court in Kentucky described the plaintiff's case as "weak" and stated that the evidence "cast substantial doubt on the ability of Plaintiff to meet even the low bar of proof required in a FELA case." *Kreig v. CSX Transp., Inc.*, 2006 WL 2792406, at *2 (W.D. Ky. 2006). Nevertheless, the Court denied the motion based on its view that the "[p]laintiff's burden is significantly lighter than in an ordinary negligence case," with its comments strongly suggesting that the outcome would have been different had this not been a FELA action. *Id.*

In *Davis v. CSX Transp.*, Inc., 2005 WL 1935676, at *1 (W.D. Ky. 2005), the Court explained that the

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[4] Not only does the *Armstrong* decision demonstrate starkly how applying a relaxed causation standard can affect the outcome of a case, it highlights the inherent unfairness of such a rule. *Ayers* suggests that the impact of holding railroads jointly liable for the negligence of other tortfeasors is mitigated by the railroads' right to seek indemnity under state law. However, the fairness of this balance is undermined if railroads must defend against a relaxed standard of causation as FELA defendants, but must prove proximate cause as indemnity plaintiffs.

"burden of proof of causation under FELA is relaxed compared to ordinary negligence actions" and therefore the plaintiff "need offer little more than a scintilla of evidence that the employer's negligence played any part in the plaintiff's injury." As a result, the Court dispensed with the need for the plaintiff to offer evidence connecting the alleged negligent conduct (allowing pools of grease to accumulate in the yard) to her injury (losing her footing and falling off a boxcar sill step), and denied the railroad's motion for summary judgment. *Id.* at *2.

In *Koller v. Burlington Northern Santa Fe Ry. Co.*, No. Civ. S-01-914 GGH (E.D. Calif. 2002), the plaintiff brought a FELA action based on his employer's failure to prevent an assault by a third party. The Court evaluated the railroad's motion for summary judgment under the premise that "[i]n a FELA case, the causation standard is relaxed" and "the jury's power to engage in inferences is significantly broader than in common law negligence actions." Examining the evidence in the context of these legal conclusions, the Court denied the railroad's motion "given the weakened causation standard in FELA cases."

Even in the rare instance where a trial court grants a defendant's dispositive motion in a FELA case, such rulings typically do not survive appellate review in courts applying a relaxed standard of causation. For example, in *Booth v. CSX Transp., Inc.*, 211 S.W.3d 81 (Ky. App. 2006), the trial court granted summary judgment for the railroad, finding that "it does not appear that the testimony of either of Plaintiff's physicians provides the necessary testimony stated within a reasonable degree of medical probability to establish causation on the part of CSX." *Id.* at 85. However, the Kentucky Court of

Appeals reversed, expressing its view that "Congress intended FELA to be a departure from common law principles of liability . . ." and that "FELA plaintiffs have a lower standard of proof than plaintiffs in ordinary negligence cases." *Id.* at 83-84.

This point was recently underscored by an Illinois district court which, referring to FELA's purported "relaxed standard for proving causation," explained that while the plaintiff's "first claim might not survive a motion for summary judgment in the traditional tort context, the low negligence threshold of FELA ensures that this count will live to see another day." *Gibbs v. Union Pac. R.R.*, 2009 WL 3064956, at *4 (S.D. Ill. 2009). Similarly, a federal court in Louisiana summarized the judicial attitude about FELA cases when it found that "FELA plaintiffs can survive dispositive motions by offering evidence which would be insufficient to overcome a similar motion in an ordinary civil case." *Kansas City Southern Ry. Co. v. Nichols Construction Co.*, 574 F.Supp.2d 590, 594 (E.D. La 2008).

B. Although Prior Rulings of this Court Supporting Proximate Cause Were Neither Overruled nor Questioned By *Rogers* it Will Take a Definitive Ruling By This Court to Resolve the Uncertainty That Has Existed for Over Fifty Years

While this Court did not directly decide the issue of the proper standard of causation under FELA in *Norfolk Southern v. Sorrell*, 549 U.S. 158 (2007), the approach adopted in that decision strongly suggests that Congress intended to incorporate common law proximate cause into FELA. *Sorrell* held that the causation standard for employee contributory negli-

gence was equivalent to the standard for employer negligence. 549 U.S. at 171. This Court based its decision in part on the fact that under common law the same standard of causation applied to both employer and employee negligence, which, it explained, was "strong evidence against Missouri's disparate standards." *Id.* at 168. Thus, *Sorrell* was grounded in the well established rule that except where Congress expressly altered the common law, FELA is to be interpreted in accordance with common law principles. *Accord Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994); *Metro-North Comm. R.R. v. Buckley*, 521 U.S. 424, 429 (1997). As with the principle of equivalence of standards, proximate cause also was the common law rule when FELA was enacted. It would be curious indeed to hold that Congress adopted the common law rule of equivalence, but at the same time rejected the equally entrenched common law rule of proximate cause. Certainly, there is no statutory basis for doing so.

In *Sorrell*, the plaintiff argued that use of the term "in whole or in part," in section 1 of FELA, but not in section 3, signaled that each section incorporated a different standard of causation, with section 1, which addresses employer negligence, calling for a more relaxed standard. *See* 45 U.S.C. §§51, 53. This Court rejected that argument. *Sorrell* instead confirmed that the "in whole or in part" language—the alleged statutory basis for the elimination of proximate cause—simply is descriptive of FELA's comparative negligence standard, under which the employer's negligence need not be the sole cause of an injury for the employer to be liable for damages (albeit, reduced damages if the employee's negligence also contributes to the injury). 549 U.S. at 170-71.

Notwithstanding the reasoning of *Sorrell*, and Justice Souter's concurring opinion, critiquing with "considerable force" the cases suggesting that FELA has abolished proximate cause, *see McBride v. CSX Transp., Inc.*, ___ F.3d ___, 2010 WL 909071, at *15 (7th Cir. 2010), it is clear that uncertainty over the proper standard of causation will continue among lower courts. *See e.g., Mills v. CSX Transp., Inc.*, 2009 WL 4547685, at *5, n. 4 (Tenn. 2009) ("It is not entirely clear which standard of causation *Rogers* applies to FELA cases—the common law standard or a relaxed standard."); *Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20, 27 (S.C. 2008)("[T]he *Sorrell* Court did not establish precisely what the FELA standard for causation is."); *Hall v. Norfolk Southern Ry. Co.*, 2007 WL 2765540, at *6, n.2 (N.D.Ga. 2007) ("With respect for [sic] a standard of causation, the Supreme Court continues to debate the precise contours of its holding in *Rogers*.")

Though *Sorrell* has ignited debate over the meaning of *Rogers*, and the proper standard of causation under FELA, some lower courts continue to view *Rogers* as precedent for the abandonment of proximate cause in FELA cases. *E.g., Medwig v. Long Island R.R.*, 2007 WL 1659201 (S.D.N.Y. 2007) (adhering to Second Circuit precedent interpreting *Rogers* as countenancing both a relaxed standard of causation and negligence in FELA cases, finding that *Sorrell* did not overrule that precedent). Others do not. *See Raab v. Utah Ry.*, 221 P.3d 219 (Utah 2009)(notion that *Rogers* "'definitively abandoned' the requirement that a FELA plaintiff show proximate cause" is "not mandated by the Supreme Court's language in *Rogers*"). In a decision earlier this year, the Seventh Circuit acknowledged that "[e]arly FELA cases did not interpret [FELA] as altering the

common-law requirement of proximate cause" and that "[t]hese early cases never have been overruled explicitly." *McBride*, 2010 WL 909071 at *4-5. Nonetheless, *McBride* "decline[d] to hold that. . . common law causation is required to establish liability under FELA," *id.* at *17, as the Seventh Circuit adhered to the notion that the concept of proximate cause has "broadened" over "FELA's history," and that a "new conception of proximate cause 'crystallized' in *Rogers*." *Id.* at *6.

Indeed, several federal courts of appeals, which previously had understood FELA to incorporate proximate cause, came to the conclusion that *Rogers* required them to repudiate their previous holdings. *See e.g.*, *Richards v. Consolidated Rail Corp.*, 330 F.3d 428 (6th Cir. 2003) (holding that *Rogers* "announced a relaxed test for establishing causation in FELA cases," *id.* at 433, and rejecting prior Sixth Circuit decision in *Reetz v. Chicago & Erie R.R.*, 46 F.2d 50 (6th Cir. 1931), as "no longer good law in light of *Rogers*." *Id.* at 437); *Compare Anderson v. Baltimore & Ohio R.R.*, 89 F.2d 629, 630 (2d Cir. 1937) (the issue is whether the defect "was the proximate cause of [plaintiff's] death.") *with Nicholson v. Erie R.R.*, 253 F.2d 939, 940 (2d Cir. 1958) ("[T]o impose liability on the defendant, the negligence need not be the proximate cause of the injury."); *Larsen v. Chicago & Northwestern Ry. Co.*, 171 F.2d 841, 844 (7th Cir. 1949) ("To recover under [FELA] plaintiff must prove that the defendant was negligent and that such negligence in whole or in part was the proximate cause of his injuries.") *with Coffey v. Northeast Ill. Reg. Comm. R.R.*, 479 F.3d 472, 476 (7th Cir. 2007) ("relaxation of common law standards of proof applies to" causation.). The Tenth Circuit explained that "[d]uring the first half of this century,

it was customary for courts to analyze liability under the FELA in terms of proximate causation," but that *Rogers* "definitively abandoned this approach." *Summers v. Missouri Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997).

Notwithstanding these holdings, the argument that FELA eliminated proximate cause finds no support in the statute's legislative history. When Congress enacted FELA, it made express changes to some of the harsher aspects of nineteenth century common law which often erected insurmountable barriers to recovery by workers sustaining job-related injuries.[5] Accordingly, contemporaneous with the statute's enactment, the Senate reported that FELA "revises the law as now administered in the courts in the United States in four important particulars." S. Rep. No. 460, at 1 (1908). Specifically, the Senate Report described these revisions to the common law as addressing the fellow servant doctrine, assumption of the risk, contributory negligence and prohibiting contracts that relieve the employer of liability. *Id.* at 1-3. There was no suggestion that the common law standard of causation was being modified. The House of Representatives offered an identical list when it described how FELA "change[d] the common-law

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[5] For example, recovery was denied if the worker knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g., Clark v. St. Paul & Sioux City R.R.*, 9 N.W. 581 (Minn. 1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875). The fellow servant rule, a variant of the assumption of the risk doctrine, held that among the ordinary risks of employment the employee takes upon himself is the "carelessness and negligence of those who are in the same employment," on the theory that "these are perils which the servant is as likely to know, and against which he can as effectually guard, as the master." *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49, 57 (Mass. 1842).

liability of employers," H.R Rep. No. 1386, at 1 (1908), noting in addition, that the FELA "makes each party responsible for his own negligence and requires each to bear the burden thereof." *Id.*

Similarly, this Court's understanding of the revisions of common law made by FELA did not include any modification to the standard of causation. Shortly after its enactment, the constitutionality of FELA was challenged. Among other arguments advanced by those challenging the statute was that in modifying the common law Congress exceeded its authority to regulate interstate commerce. In addressing this challenge, which it rejected, this Court described those modifications as including (1) the abrogation of the fellow servant rule; (2) the replacement of the contributory negligence rule with a scheme of comparative negligence; (3) the abrogation of the assumption of the risk doctrine where a violation of a safety statute caused the injury; and (4) the right of a personal representative to seek damages for the death of an employee for the benefit of designated relatives. *Mondou v. N.Y., N. H. & Hartford R.R.*, 223 U.S. 1, 49-50 (1912). None of these changes, however, addresed the standard of causation. Not surprisingly, as petitioner has shown, this Court's decisions in the decades following FELA's enactment were remarkably consistent in identifying proximate cause as the proper standard of causation.[6] [Pet. at 24-25]

Since Congress has made no change to the relevant language of FELA since 1908, there simply is no basis to support the assertion that the concept of

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[6] *See e.g., Lang v. N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921); *St. Louis-S.F. Ry. v. Mills*, 271 U S. 344, 347 (1926); *Northwestern Pac. R R. v. Bobo*, 290 U.S. 499, 503 (1934).

proximate cause has broadened over the years since FELA was enacted. Some courts have asserted that *Rogers*' purported introduction of a relaxed causation standard was to conform to the 1939 amendments to FELA. *Richards*, 330 F.3d at 434; *Morrison v. N.Y. Cent. R.R.*, 361 F.2d 319, 320 (6th Cir. 1966). However, a review of those amendments gives lie to that rationale.

Rogers does briefly reference the 1939 amendments, 352 U.S. at 509-10, but never suggests that they required a reexamination of the causation standard under FELA, for the simple reason that they did not. The 1939 amendments were primarily intended to ease the path toward recovery by FELA plaintiffs by modifying aspects of the statute that served to prevent injured employees from recovering, either because they could not meet the strict test of interstate commerce[7] or because the employer successfully argued that the employee had assumed the risks inherent in the employment. However, the 1939 amendments did not purport to address, let alone modify, the standard of causation.

Adding a provision to section 1 of FELA, the 1939 amendments expanded the scope of FELA's coverage so that workers would no longer have to prove they were engaged directly in interstate commerce at the time they were injured in order to come within the scope of FELA's coverage. Act of Aug. 11, 1939, c. 685, §1, 53 Stat. 1404; *see* S. Rep. No. 661, at 2-3 (1939); *see Southern Pac. Co. v. Gileo*, 351 U.S. 493

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[7] In order to recover, "the employee, at the time of the injury," had to be "engaged in interstate transportation, or in work so closely related to it as to be practically a part of it." *See Shanks v. Delaware, Lackwanna & Western R.R.*, 239 U.S. 556, 558 (1916).

(1956); *Reed v. Pennsylvania R.R.*, 351 U.S. 502 (1956). In addition, in 1939, Congress amended FELA to eliminate the defense of assumption of the risk in all cases. *Id.* The 1939 amendments also increased the statute of limitations under FELA from two to three years, *id.* at §2, and prohibited railroads from establishing and enforcing rules which penalized employees for giving information concerning an accident to the injured person or his representative. *Id.* at §3. Thus, there is no statutory basis for incorporating into FELA a standard of causation that differs from what Congress intended in 1908.

Indeed, a few years after enactment of the 1939 amendments, this Court described the "proximate cause" standard as requiring a finding "that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances," adding that "[e]vents too remote to require reasonable prevision need not be anticipated." *Brady v. Southern Ry. Co.*, 320 U.S. 476, 483 (1943). Rather than repudiate *Brady* and dozens of other prior decisions, as the Petition explains, *Rogers* "does not alleviate a plaintiff's burden to prove proximate cause." [Pet. at 27] That lower courts would suggest otherwise underscores the vital need for this Court directly to address the important issue of causation under FELA.

The "relaxed" standard that has become entrenched in many jurisdictions will continue to impact numerous cases in the future. Several thousand FELA lawsuits are filed each year. Except in the occasional case where the railroad defendant admits liability, causation is an element of the plaintiff's case in each such lawsuit. The "relaxed"

standard utilized by some courts will continue to make recovery of damages more likely—often virtually assured—in FELA cases.

II. THE LOWER COURT'S FAILURE TO DEFER TO THE FEDERAL RAILROAD ADMINISTRATION'S INTERPRETATION OF ITS OWN FEDERAL SAFETY REGULATION HAS THE POTENTIAL FOR GREATLY AND IMPROPERLY EXPANDING FELA LIABILITY

The decision affirming the grant summary judgment on the grounds that Conrail violated 49 C.F.R. §229.43(a) demands review because the lower court's failure to defer to the FRA's interpretation of its own regulation will have profound implications for the rail industry's fleet of over 24,000 locomotives. Section 229.43(a) states, in relevant part, that "[p]roducts of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions." In a ruling affirmed by the Ohio Court of Appeals, the trial court held that evidence of the presence of diesel exhaust in a locomotive cab, at any level, constitutes a violation of §229.43(a), resulting in a finding of per se negligence in FELA cases. *Battaglia*, 2009 WL 3325903, at *5. The court justified its ruling on the grounds that the language of the regulation unambiguously required such a result. *Id.* The language of §229.43(a) does not remotely compel the conclusion that the presence of diesel exhaust at any level necessarily requires a finding of negligence per se. Yet the court refused to consider any evidence supporting a less rigid, and more reasonable, reading

of the regulation, including evidence reflecting the intent of the FRA, the agency which promulgated the regulation and which is charged by Congress with its enforcement.

The lower court's conclusion that the regulation is unambiguous is simply wrong. Section 229.43(a) contains two operative sentences. The first requires that products of combustion be released outside the cab: it does not "unambiguously" demand that absolutely no exhaust ever enter the cab once it has been released outside the locomotive. *Id.* The second sentence is directed at the design of exhaust stacks, requiring that they be of sufficient height, or otherwise, to prevent entry of exhaust into the cab under usual operating conditions. *Id.* The court below found a violation of the regulation without any consideration of whether the stacks on the locomotives plaintiff operated were deficient in that regard.

When confronted with the issue of whether a safety regulation has been violated, courts must focus on the language, purpose and intent of the regulation. The Secretary of Transportation has plenary power to promulgate regulations "for every area of railroad safety," 49 U.S.C. §20103, authority which is exercised by FRA. In promulgating rail safety regulations, it is not FRA's intent to impose impossible obligations on railroads that serve no genuine safety-related purpose. *See* Federal Railroad Administration, Railroad Occupational Safety and Health Standards; Termination, Policy Statement 43 Fed. Reg. 10584, 10586 (1978), (FRA "must decide what regulations are necessary and feasible."). When applying §229.43(a), FRA has stated that its focus is on defects (e.g., leaks) in the locomotive exhaust system and the sufficiency of stack heights. Federal Railroad

Administration, Locomotive Crashworthiness and Cab Working Conditions, Report to Congress, ch. 7, p.7-1 (1996). Additionally, FRA has explained that it "employs the OSHA criteria to determine compliance with the Locomotive Inspection Act," *id.* at 7-2, indicating that the purpose of §229.43(a) is to protect employees from harmful levels of diesel exhaust, not to assure they work in a pristine environment.

FRA's interpretation of §229.43(a) is entitled to deference because it is entirely consistent with the language of the regulation and plainly reasonable under the circumstances. *See* Pet. at 28. FRA's stated policy recognizes that it would be virtually impossible for locomotive cabs to be perfectly sealed and airtight, a wholly reasonable conclusion considering that a locomotive cab is a compartment that contains windows and doors designed to open and close.

The lower court's failure properly to defer FRA's interpretation of §229.43(a)'s language has the effect of potentially rendering every locomotive used by railroads to be in violation of federal law.[8] Indeed,

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[8] The court's approach to interpreting the regulation, without consideration of the evidence of the regulatory intent presented by Conrail, was at odds with the fundamental tenets of statutory interpretation, which calls for construing statutes in a way that is consistent with their overall purpose and structure. *See Heydenfeldt v. Daney Gold and Silver Mining Co.*, 93 U.S. 634, 638-39 (1876). The Supreme Court has repeatedly explained that "[a]ll laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character." *Sorrells v. United States*, 287 U.S. 435, 447 (1932) (quoting *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87 (1868));

given the court's ruling, plaintiff's testimony that he was "continuously exposed to diesel exhaust inside the locomotive cab since the first day he 'hired out,'" Pet. App. at 30a, would call for a conclusion that virtually all the locomotives that plaintiff operated violated the regulation. However, FRA, the agency that monitors railroad compliance with safety regulations, has never found such mass violations of §229.43(a).

The lower court's failure to defer to the FRA's interpretation of its safety regulation significantly affects the outcome of a FELA case. Violation of such a regulation obviates the need for the plaintiff to prove negligence. *Urie v. Thompson*, 337 U.S. 163, 174 (1949). Because the lower court failed to offer a reasoned analysis of §229.43(a), and given the potential impact that violation of the regulation can have on the outcome of a FELA case, this Court should grant the petition and provide guidance to lower courts regarding the circumstances that require a court to defer to an agency's interpretation of its own safety regulations.

United States v. Katz, 271 U.S. 354, 357 (1926), *United States v. Ryan*, 284 U.S. 167, 175 (1931); *see also Hawaii v. Mankichi*, 190 U.S. 197, 214 (1903) ("'Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.'" (quoting *Lau Ow Bew v. United States*,144 U.S. 47, 59 (1892)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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